Recalibrating Federal Judicial Independence

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It is well settled that independent courts play a vital role in promoting rule-of-law and separation-of-powers norms. At the same time, judicial independence must be reconciled with other values that we also wish to recognize as foundational. Professor Brudney addresses two areas of controversy that are associated with the celebration of judicial autonomy in our legal culture. He first discusses the role of political and personal background factors in shaping judicial selection and influencing judicial outcomes. He explains why both the President and Congress have come to rely increasingly on such background factors when seeking to anticipate the broad contours of judicial performance. While critical of occasional excesses in that monitoring effort, Brudney argues for greater awareness of—and sophistication about—the ways in which such pre-judicial background and experiences contribute to the development of legal doctrine. Brudney then turns to the realm of statutory interpretation, exploring the relationship between the norm of legislative supremacy and the professed aspiration for a more dependent *judiciary. In examining three major theories of statutory construction, Brudney suggests that two of them—textualism and dynamic interpretation—are more likely to view independent courts as acceptable if not preferred agents of social progress, while the third theory—intentionalism—is inclined to be more respectful of Congress's authority and perhaps also more skeptical about the role of courts as independent players in this particular policymaking arena.*

INTRODUCTION

The concept of judicial independence is powerful yet elusive. A judiciary liberated from improper influences is best able to vindicate rule-of-law and separation-of-powers values that we regard as foundational. At the same time, which influences qualify as improper will vary as one contemplates other important values that may be served by having a somewhat less independent judiciary. In that regard, one might distinguish, in rule-of-law terms, between the impact of an imminent threat or bribe and the impact of a judge's own political and personal experiences, or, from a separation-of-powers perspective, between the constraints generated by a powerful legislator's *ex parte* telephone call and the constraints generated by legislative history accompanying statutory text.[1]

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[1] *See generally* Kim Lane Scheppele, *The History of Normalcy: Rethinking Legal Autonomy and the Relative Dependence of Law at the End of the Soviet Empire*, 30 LAW & SOC'Y REV. 627, 628–31 (1996) (reviewing Inga Markovits' account of East German legal system).

There are comparative dimensions to consider as well. In nascent or fragile democratic settings, creating an independent judiciary often requires judges to engage in certain nontraditional activities that American observers might deem disagreeably "political." These include reaching out to the international judicial community to help monitor domestic case law developments, or relying on back channel communication with the executive branch to ward off political incursions.[2] Further, within our own constitutional system, federal judges enjoy a measure of formal independence from electoral and financial pressures pursuant to Article III[3] that is generally not available at the state level.[4]

Yet even with respect to our constitutionally protected and mature federal judiciary, there are discordant aspects to the current debate. Judicial autonomy is rightly viewed as an important means to the two principal ends identified above. Independent federal courts help secure the reasoned and consistent application of judge-made or codified rules. They also help to provide an effective check on excessive assertions of power by the political branches against individual citizens or

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[2] *See, e.g.*, JENNIFER A. WIDNER, BUILDING THE RULE OF LAW 23–40, 98–113 (2001) (examining efforts to build judicial independence in Tanzania and several other African countries since the 1980s); Gábor Halmai & Kim Lane Scheppele, *Living Well Is the Best Revenge: The Hungarian Approach to Judging the Past*, *in* TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES 155–84 (A. James McAdams ed., 1997) (analyzing efforts to develop judicial independence in Hungary in the 1990s).

Judges in mature democracies may at times initiate outreach to international jurists. *See* Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1120–23 (2000). They also may engage in back channel communications with the executive branch, although such exchanges tend not to be favorably regarded by the legal community and the general public. *See* Louis L. Jaffe, *Professors and Judges as Advisors to Government: Reflections on the Roosevelt–Frankfurter Relationship*, 83 HARV. L. REV. 366, 373–74 (1969) (arguing that it undermines public confidence in the judiciary for justices to consult with government officials, including the President, and that justices should give advice only through public testimony before committees of Congress and only on matters relating to the administration of the courts). *See generally Nonjudicial Activities of Supreme Court Justices and Other Federal Judges: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 91st Cong. 116–18 (1969) (testimony of Hon. Dean Acheson); *id.* at 136–38 (testimony of Prof. Alexander Bickel); *id.* at 325–29 (statement of Prof. Ralph Winter).

[3] U.S. CONST. art. III, § 1 (providing that federal judges "shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office"); *see* United States v. Will, 449 U.S. 200, 217–30 (1980) (invalidating federal statutes postponing or repealing previously authorized salary increases for federal judges).

[4] *See* Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. REV. 973, 976 (2001) (reporting that over 80% of state trial and appellate judges stand for election of some type); Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 725–26 (1995) (reporting that in thirty-eight of fifty states, most judges are electorally accountable to the citizenry through initial and periodic elections or through periodic re-election following an initial gubernatorial appointment).

the states. An independent judiciary, however, is not alone sufficient to accomplish those ends. Competent and honorable attorneys, respectful legislators and executive officials, and the public's confidence in "the system" all figure importantly in securing rule-of-law and separation-of-powers values. Moreover, at some point the uncritical celebration of judicial independence may in fact adversely affect those values, or other values that are important in our legal culture. Accordingly, it is worth considering whether assertions about judicial independence in the federal context warrant more circumspect attention and perhaps a less ambitious set of expectations.

One can begin by acknowledging the primacy of judicial independence in certain core settings. Thus, independence would be inappropriately compromised, and the rule of law undermined, if a federal judge had a financial or personal interest in a case before him,[5] or if he were assigned to a case with a view toward determining outcomes.[6] Similarly, independence would be disserved, and the separation of powers thereby jeopardized, if a judge were directly rebuked by executive branch officials for a decision he had made, or harassed by members of Congress with respect to a case he was about to decide.[7]

Beyond this relatively noncontroversial core, it becomes more difficult to separate the aspirational from the real. For instance, an independent judiciary ideally promotes respect for the rule of law by resolving each case through an openly administered and broadly accessible decision structure. Such a process allows litigants and the interested public to assess how seriously and thoughtfully a court deliberates in reviewing the controversy at hand, as well as how consistently and persuasively it applies legal precedent. Yet the emergent collective determination by the United

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[5] *See* Jill Abramson, *Senate Convicts, Removes Hastings from Judgeship*, WALL ST. J., Oct. 23, 1989, at A8 (reporting Senate conviction of District Judge Alcee Hastings on impeachment article of conspiring to accept a bribe); Ruth Marcus, *Senate Overwhelmingly Votes to Remove U.S. Judge Nixon*, WASH. POST, Nov. 4, 1989, at A2 (reporting District Judge Walter Nixon's conviction on impeachment article of lying about his personal involvement in case involving the son of a business partner).

[6] *See* J. Robert Brown, Jr. & Allison Herran Lee, *Neutral Assignment of Judges at the Court of Appeals*, 78 TEX. L. REV. 1037 (2000) (discussing evidence that Fifth Circuit in the 1960s made judicial panel assignments in some civil rights cases in an effort to produce "liberal" results).

[7] *See* Abrahamson, *supra* note 4, at 988–90 (criticizing condemnation by media and politicians of District Judge Harold Baer's decision to exclude certain drug-related evidence as "creat[ing] a climate that undermines judicial independence"); William Schneider, *Political Pulse–Getting out Front on the Crime Issue*, NAT'L J., Apr. 13, 1996, at 854 (suggesting that Judge Baer's reversal of his original decision was a capitulation to pressure from federal and state politicians). There is, however, a sometimes fine line between such personal attacks and a robust critique of judicial decisions and reasoning that is "indispensable to the intellectual integrity of the judicial process and important in the development of the law." Abrahamson, *supra* note 4, at 990; *see also* Larry D. Kramer, *The Supreme Court v. Balance of Powers*, N.Y. TIMES, Mar. 3, 2001, at A13 (arguing that when the Supreme Court's decisions threaten to shift distribution of power among branches, Congress and the President have a duty to respond, "at least through trenchant public criticism").

States Courts of Appeals to publish a mere 20% of their dispositions on the merits casts doubt on whether attainment of that ideal is feasible or even desirable.[8] Perhaps public accountability and transparency are in many circumstances simply less important than the need to allocate judicial energies in a prudent fashion, or to channel the waves of potential precedent.[9]

This article addresses two areas of controversy that are associated with the effort to create and maintain judicial autonomy in our legal culture. Part I examines the role of political and personal background factors in shaping judicial selection and influencing judicial outcomes. Judges and some scholars have worried that inordinate attention to these background experiences by politicians and academics may compromise rule-of-law norms. Part I describes how these background factors serve important competing values, and it encourages greater public attention to their role in the appointment process. Further, by recognizing the often subtle relationship between these background factors and judicial decisionmaking, Part I also suggests certain limitations on the conception of judicial independence as an ideal.

Part II focuses on the realm of statutory interpretation, exploring the relationship between a *less* independent judiciary and the separation-of-powers norm of legislative supremacy. Part II discusses how two currently fashionable interpretive approaches—textualism and dynamic interpretation—tend to promote judicial independence in somewhat different ways, at the possible expense of legislative authority. Part II suggests that the preferred model for a federal court may be the somewhat more dependent, albeit shopworn, approach of seeking to resolve statutory ambiguities primarily by reference to the specific intent or general purpose of the enacting legislature. The article concludes by maintaining that while an independent federal

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[8] *See* JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2000 ANNUAL REPORT OF THE DIRECTOR 44 tbl.S-3 (2001) (reporting that 79.8% of the 27,516 cases resolved on the merits during the year ending September 30, 2000 were unpublished). The 79.8% figure reflects a dramatic increase over a twenty-five year period. *See* Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 75–76 (2001). Specialized services and electronic databases disseminate some unpublished opinions, but their collections are not complete.

[9] *See generally* Merritt & Brudney, *supra* note 8, at 73 (discussing conflicting policy arguments as to the fairness of publication rules); *id.* at 121 (concluding from empirical study that panels generally pursue neutral criteria when deciding which opinions to publish, but that wide variation in publication rates among circuits resolving comparable claims, and evidence of partisan disagreement within universe of unpublished decisions, raise troubling rule-of-law concerns). *Compare, e.g.*, Elizabeth M. Horton, Comment, *Selective Publication and the Authority of Precedent in the United States Courts of Appeals*, 42 UCLA L. REV. 1691 (1995), *and* Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177 (1999), *with* Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 785–802 (1995), *and* William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573 (1981).

judiciary is vital in certain core respects, increased attention to and candor about dependent characteristics also are needed in order to place the judicial role in proper perspective.

I. THE IMPACT OF JUDICIAL BACKGROUND

A. *Political Background and Judicial Selection*

For at least the past seventy years, partisan political factors have played a central role in the recruitment and confirmation of federal judges. Presidential appointments of Supreme Court Justices reflect a strong interest in choosing individuals based on "political and ideological compatibility."[10] Nearly 90% of Justices are members of the President's own party,[11] and presidential observations as well as empirical research confirm the further importance of ideological motivation when recruiting within party limits.[12]

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[10] HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS 2 (revised ed. 1999); *see also* LAWRENCE BAUM, THE SUPREME COURT 34–49 (7th ed. 2001) (discussing influence of political and ideological factors); TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT 85–93 (1999) (same).

[11] *See* LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM 318–21 (2d ed. 1996) (reporting that from 1932 to 1994, sixteen of nineteen Justices appointed by Democratic presidents and thirteen of fifteen appointed by Republican presidents have come from the President's own party); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 127 (1993) (reporting that from 1789 to 1992, 126 of 145 Supreme Court nominees (87%) have come from the President's party).

[12] *See* E.W. Kenworthy, *Nixon Scores 'Indulgence'*, N.Y. TIMES, Nov. 3, 1968, at A1 (reporting Nixon campaign pledge to appoint justices who would be less sympathetic to criminal defendants and would be "strict constructionists" in contrast to Warren Court justices); LIVA BAKER, MIRANDA: CRIME, LAW AND POLITICS 273–75 (1983) (discussing President Nixon's emphasis on conservative judicial philosophy when considering replacement for Chief Justice Warren); Sheldon Goldman, *The Bush Imprint on the Judiciary: Carrying on a Tradition*, 74 JUDICATURE 294, 297 (1991) (reporting that the first President Bush emphasized to his aides handling judicial nominations his desire to appoint "highly qualified persons who are philosophically conservative"); ABRAHAM, *supra* note 10, at 317 (reporting President Clinton's declaration that he would "look for someone [for the Supreme Court] who believed in the constitutional right to privacy . . . who [was] pro-choice"); David L. Greene & Thomas Healy, *Bush Sends Judge List to Senate*, BALT. SUN, May 10, 2001, at A1 (reporting that the second President Bush identified Justices Scalia and Thomas as federal judges he admires most, from philosophical perspective); William E. Hulbary & Thomas G. Walker, *The Supreme Court Selection Process: Presidential Motivations and Judicial Performance*, 33 W. POL. Q. 185, 189 (1980) (examining eighty-four Supreme Court nominations from 1789 to 1967 and finding that in 93% of cases, presidents were motivated by potential nominee's political philosophy).

The story is substantially similar with respect to selection of lower federal court judges. From Franklin Roosevelt to Bill Clinton, more than 90% of district judges[13] and about 90% of appellate judges[14] came from the President's own political party. Lower court judges may be selected in a less predictably ideological manner than Supreme Court Justices, due in part to the moderating influence of home state senators in the selection process.[15] Since the mid 1970s, however, circuit court appointments have been increasingly affected by presidentially established nominating commissions and by advisory committees directed from the White House.[16] Although these commissions and committees have emphasized professional

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[13] SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 349 (1997) (reporting that for district judges, 98.5% of Roosevelt's 133 appointees were Democratic, as were 93.8% of Truman's 97 appointees, 92.1% of the 229 Kennedy-Johnson appointees, and 90.6% of Carter's 202 appointees; while 95.2% of the 126 Eisenhower appointees were Republican, as were 89.6% of the 231 Nixon-Ford appointees, and 91.7% of the 290 Reagan appointees); Sheldon Goldman et al., *Clinton's Judges: Summing Up the Legacy*, 84 JUDICATURE 228, 244 (2001) (reporting that for district court judges, 87.5% of Clinton's 305 appointees were Democratic, while 88.5% of Bush's 148 appointees were Republican; for each president, the remaining appointees were divided about equally between those belonging to the other major political party and those with no political affiliation at all).

[14] GOLDMAN, *supra* note 13, at 355 (reporting that for circuit court judges, 96% of Roosevelt's 50 appointees were Democratic, as were 88.5% of Truman's 26 appointees, 95.1% of the 61 Kennedy-Johnson appointees and 82.1% of Carter's 56 appointees (although only 4 Carter appointees (7.1%) were Republican); while 93.3% of the 45 Eisenhower appointees were Republican, as were 93.0% of the 57 Nixon-Ford appointees and 96.2% of the 78 Reagan appointees); Goldman et al., *supra* note 13, at 249 (reporting that for circuit court judges, 85.2% of Clinton's 61 appointees were Democratic and only 6.6% were Republican, while 89.2% of Bush's 37 appointees were Republican and only 2.7% were Democratic).

[15] Home state senators from both parties may promote or oppose individual nominees; because this senatorial influence often stems from a personal friendship or professional association with a nominee or potential nominee, it may temper the ideological nature of lower court appointments. Home state senators also may rely on the "blue slip" veto procedure that has operated for decades within the Senate Judiciary Committee. *See* GOLDMAN, *supra* note 13, at 131–34, 173, 209–11 (discussing importance of home state senator rule); *id.* at 11–12 (describing blue slip veto procedure that allows home state senators from either party effectively to kill a nominee's chances by marking "objection" on the blue slip sent to them by counsel for the Senate Judiciary Committee); KEVIN L. LYLES, THE GATEKEEPERS: FEDERAL DISTRICT COURTS IN THE POLITICAL PROCESS 58–59 (1997) (describing origins and history of blue slip procedure); CHARLES H. SHELDON & LINDA S. MAULE, CHOOSING JUSTICE: THE RECRUITMENT OF STATE AND FEDERAL JUDGES 184–85 (1997) (same).

[16] *See* GOLDMAN, *supra* note 13, at 238 (discussing Carter's creation of United States Circuit Judge Nominating Commission in 1977); *id.* at 292, 300, 358 (discussing Reagan's creation of Federal Judicial Selection Committee, chaired by White House Counsel); Goldman, *supra* note 12, at 296–97 (discussing first President Bush's decision to continue the President's Committee on Federal Judicial Selection, created under Reagan, and to continue the "systematic screening process emphasizing judicial philosophy" also begun under Reagan); Sheldon Goldman, *Judicial Selection Under Clinton: A Midterm Examination*, 78 JUDICATURE 276, 278–79 (1995) (discussing

qualifications, diversity of backgrounds, and scholarly perspective,[17] ideology has come to play a more important role in appellate judge appointments, especially since 1980.[18]

Both partisan and ideological considerations also figure prominently in the Senate's role as part of the judicial selection process. With respect to Supreme Court Justices, a number of studies have found that confirmation rates are substantially lower when the Senate is not controlled by the President's party,[19] that most unsuccessful nominations involve attempts to replace a justice with a nominee from the opposite party,[20] that party affiliation is especially important for controversial nominations,[21] and that "confirmation voting is decisively affected by the ideological

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operation of Judicial Selection Group, a joint White House-Justice Department Committee); Thomas Edsall, *White House Prepares Judicial Nominating Blitz*, WASH. POST, Apr. 25, 2001, at A29 (describing second Bush Administration's judicial selection process as directed by ad hoc group of fifteen to twenty, comprised of staffers in White House Counsel's office and Justice Department appointees). For an argument that presidential selection of appellate court candidates has become distinctly more politicized and policy-oriented since the Carter Administration, see Elliot E. Slotnick, *A Historical Perspective on Federal Judicial Selection*, 86 JUDICATURE 13, 14–15 (2002).

[17] *See* GOLDMAN, *supra* note 13, at 238–50 (discussing emphasis on affirmative action and professional qualifications in Carter Commission's operations); Goldman, *supra* note 12, at 297 (discussing first President Bush's instructions that recruitment should be targeted to highly qualified persons and also to searching out "appropriately qualified women and minorities").

[18] *See* GOLDMAN, *supra* note 13, at 296–319 (discussing importance of policy and ideology in Reagan Administration selection of appellate judges); Goldman, *supra* note 12, at 296–97 (emphasizing importance of conservative ideology in first Bush Administration); Dick Lehr, *Clinton Vow on Roe Examined Anew*, BOSTON GLOBE, Nov. 1, 1992, at 24 (reporting Clinton's pledge as presidential candidate that his Supreme Court nominees would have to "be strong supporters of Roe v. Wade"); Edsall, *supra* note 16 (emphasizing that second Bush Administration's judicial selection process "has been dominated by deeply conservative legal strategists"); Dan Carney & Alexandra Starr, *New Order in the Court*, BUS. WK., Apr. 23, 2001, at 88 (reporting that second President Bush's judicial selection committee is controlled by "committed conservatives," many of whom belong to the Federalist Society).

[19] *See, e.g.*, BAUM, *supra* note 10, at 52; SEGAL & SPAETH, *supra* note 11, at 144–45.

[20] *See* P.S. Ruckman, Jr., *The Supreme Court, Critical Nominations, and the Senate Confirmation Process*, 55 J. POL. 793, 797 (1993); *see also* EPSTEIN ET AL., *supra* note 11, at 317–20 (listing seven rejected nominees between 1894 and 1987; three were nominated by Democratic presidents to replace Republican justices and three more were nominated by Republican presidents to replace Democratic justices).

[21] *See* SEGAL & SPAETH, *supra* note 11, at 139, 142 (reporting that for Bork nomination, 96% of Senate Democrats opposed nominee, and 87% of Republicans supported him, while for Thomas nomination, 81% of Democrats opposed the nominee and 95% of Republicans supported him); John D. Felice & Herbert F. Weisberg, *The Changing Importance of Ideology, Party, and Region in Confirmation of Supreme Court Nominees*, 77 KY. L.J. 509, 518–21 (1989) (reporting that for nine controversial nominations between 1950s and 1980s, Republican Senators supported

distance between senators and nominees."[22] Similarly, there is ample evidence that political partisanship and ideology affect the dynamics and results of the confirmation process for appellate and district court judges. Presidents are less successful in moving their nominees when faced with a Senate controlled by the opposite party,[23] and less able to appoint nominees based on presidential policy considerations when the home state senator or the Judiciary Committee chairman has divergent policy preferences.[24]

Empirical research that identifies factors influencing aggregate judicial selection cannot, of course, adequately explain the complex nomination and confirmation process for individual judges. Presidents and administration officials, senators and their staffs, and interested constituency groups each bring a diverse set of motives to the table when developing and winnowing a particular list of recommended candidates.[25]

Republican presidents' nominees at 86% rate, but supported Democratic presidents' nominees at only 44% rate).

[22] Charles M. Cameron et al., *Senate Voting on Supreme Court Nominees: A Neoinstitutional Model*, 84 AM. POL. SCI. REV. 525, 530 (1990); *see* Felice & Weisberg, *supra* note 21, at 525 (reporting that influence of ideology on confirmation voting for nine controversial Supreme Court justices is significant even after controlling for partisanship); Donald R. Songer, *The Relevance of Policy Values for the Confirmation of Supreme Court Nominees*, 13 LAW & SOC'Y REV. 927, 946 (1979) (reporting that policy disagreement with the nominee was the major cause of votes against confirmation for fourteen controversial nominations studied).

[23] *See, e.g.*, Sheldon Goldman & Elliot Slotnick, *Clinton's First Term Judiciary: Many Bridges to Cross*, 80 JUDICATURE 254, 255 (1997) (reporting that Clinton nominees to lower courts experienced substantially reduced rate of confirmation success following Republican takeover of Senate in 1994); Goldman et al., *supra* note 13, at 233–34, 239–41 (reporting that Clinton nominees experienced unusual delays and lack of success during 106th Congress, which featured public bitterness over several confirmation battles for lower court appointments); Sheldon Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing Up*, 72 JUDICATURE 318, 319 (1989) (reporting that following Democratic takeover of Senate in 1986, new majority used its power to delay many Reagan nominees and derail a number of others).

[24] *See, e.g.*, Michael W. Giles et al., *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POL. RES. Q. 623, 638 (2001) (reporting that lower court appointments from 1952 to 1988 were more responsive to home state political milieu—and less responsive to presidential policy agenda—when courtesy toward the senator from the President's own party was a factor); Roger E. Hartley & Lisa M. Holmes, *Increasing Senate Scrutiny of Lower Federal Court Nominees*, 80 JUDICATURE 274, 276–78 (1997) (reporting that since early 1970s, when chairman of Senate Judiciary Committee votes consistently against the President on key issues, there is more delay and rejection in the confirmation process); *see also* Howard Kurtz, *GOP Senators Foiled on Judicial Nominees: Justice Department Is Suspected of Basing Opposition on Ideological Grounds*, WASH. POST, Feb. 20, 1987, at A17 (reporting on conflicts between Reagan Administration and moderate Republican senators whose choices for lower federal court judges were delayed or rejected on ideological grounds).

[25] *See generally* BAUM, *supra* note 10, at 34–59.

Nor should these studies be read to suggest that political factors are the primary qualification for ascending to the federal bench. There is an expectation that suitable candidates should be sufficiently accomplished in terms of their legal abilities, temperament, and professional experience. The American Bar Association has evaluated candidates on such merit-based grounds since the Truman Administration, and until recently, both Congress and the Executive Branch have utilized those evaluations.[26]

This focus on lawyerly competence is surely rational: neither the Justice Department nor the White House has an interest in installing mediocre or disreputable individuals on the federal bench.[27] As a regular repeat player in federal litigation, the Executive Branch should prefer judges who are likely to apply language, precedent, and logical reasoning in rigorous and relatively foreseeable fashion when deciding cases. The President's party may also see some political value in appointing a "high quality" judiciary that is well received by the organized bar and the informed media.

Yet while merit-based considerations are both necessary and important, they have not been viewed as sufficient by either of the two branches constitutionally charged with designating members of the federal bench. Political and ideological background have been relied upon by presidents, senators, and their staffs when choosing from within a pool of talented and experienced candidates. Rather than regard such reliance

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[26] *See generally* ABRAHAM, *supra* note 10, at 23–28; DAVID M. O'BRIEN, JUDICIAL ROULETTE: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON JUDICIAL SELECTION 81–94 (1988); GEORGE WATSON & JOHN A. STOOKEY, SHAPING AMERICA: THE POLITICS OF SUPREME COURT APPOINTMENTS 83–85, 108–12 (1995). *But see* Amy Goldstein, *Bush Curtails ABA Role in Selecting U.S. Judges*, WASH. POST, Mar. 23, 2001, at A1 (reporting second President Bush's decision to discontinue fifty-year tradition of executive branch reliance on ABA for advice on potential candidates for federal bench). The ABA role in candidate evaluation has itself been criticized as "political" over the years, although perceptions of its political orientation have shifted. *Compare, e.g.*, Elliot E. Slotnick, *The ABA Standing Committee on Federal Judiciary: A Contemporary Assessment*, 66 JUDICATURE 385, 392–93 (1983) (concluding that ABA rating system favored white male candidates from traditional legal practice backgrounds), *with* Terry Carter, *A Conservative Juggernaut*, A.B.A. J., June 1997, at 32 (reporting Senate Judiciary Committee Chairman's decision to end formal ABA role of advising Senate, based on his view the Association was too liberal).

[27] *See* GOLDMAN, *supra* note 13, at 4 note c (discussing why it is good politics as well as good presidential policy to recruit and nominate highly qualified judges). The unsuccessful effort by certain senators to make a virtue out of mediocrity with respect to a Supreme Court nominee illustrates the outlier nature of such anti-merit sentiments. *See* ABRAHAM, *supra* note 10, at 11 (recounting comments by Senator Hruska, floor manager for the Carswell nomination, that "[e]ven if he is mediocre there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they, and a little chance? We can't have all Brandeises, Cardozos, and Frankfurters, and stuff like that there"). *But cf.* JOHN W. DEAN, THE REHNQUIST CHOICE 125–26, 133–42, 187 (2001) (discussing President Nixon's willingness to consider mediocre or even outrageous candidates for the Supreme Court in 1971, at least partly as a form of payback for the Senate's previous rejection of his nominees).

as a threat to judicial autonomy, one could view it as promoting a constructive form of judicial dependence on the politically accountable branches.

Over the past several decades, constitutional and statutory interpretation have become matters of intense political conflict and controversy. Judicial appointments play a role in this controversy because executive branch officials understandably perceive the courts in part as vehicles that can either support or undermine their policy agenda. The Executive Branch often wants the courts to enforce certain legal rules expansively while urging that they exercise restraint in other areas of public law.[28] Indeed these preferences may on occasion shift rather suddenly depending on which political party is shaping the federal government's judicial agenda.[29]

The perception that courts are important as policymakers has become even more widespread during our prolonged era of divided government, in which presidents find it very difficult to steer their own legislative program through a Congress effectively controlled by the opposite party.[30] The White House and executive branch agencies regularly must manage a range of imbedded regulatory schemes addressed to civil rights, workplace protections, the environment, and other politically controversial matters. In this setting, executive branch officials may well find court-centered implementation strategies more meaningful than efforts at legislative reform.[31]

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[28] *See generally* Jeremy Rabkin, *At the President's Side: The Role of the White House Counsel in Constitutional Policy*, 56 LAW & CONTEMP. PROBS. 63, 85–86 (1993) (discussing White House influence in shaping Justice Department strategy on civil rights litigation before Supreme Court).

[29] *See, e.g.*, REBECCA MAE SALOKAR, THE SOLICITOR GENERAL 61 (1992) (reporting Reagan Administration's 1982 reversal of Solicitor General's position regarding the constitutionality of tax-exempt status for a private college that discriminated on basis of race; the Supreme Court subsequently appointed private attorney to argue Government's position from lower courts); Robert V. Percival, *Environmental Law in the Supreme Court: Highlights from the Marshall Papers*, 23 ENVTL. L. REP. 10606, 10614 (1993) (describing Reagan Administration Justice Department efforts to advocate less expansive approach toward enforcement of occupational health standards by shifting government's position in midst of 1981 Supreme Court litigation); Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1439–41 (1998) (reporting Clinton Administration's 1993 reversal of prior Justice Department position on retroactivity of 1991 Civil Rights Act). *See generally* John Ferejohn, *Judicializing Politics, Politicizing Law*, LAW & CONTEMP. PROBS., Summer 2002, at 43-44, 63-65 (discussing politicization of judicial decisionmaking as more developed under U.S. legal traditions than in Europe).

[30] Between 1968 and 2002, Congress (at least one chamber) and the Presidency were controlled by different parties for all years except 1977–80, 1993–94, and 2001.

[31] *See generally* Linda R. Cohen & Matthew L. Spitzer, *The Government Litigant Advantage: Implications for the Law*, 28 FLA. ST. U. L. REV. 391 (2000) (discussing Government's ability to pursue its policy program successfully before Supreme Court by selective filing of petitions for certiorari); Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 692–718 (1989) (discussing Government's ability to maximize its

Further, in areas where federal regulation is less comprehensive or even largely absent, private litigation before the federal courts may effectively help shape public policy, as has occurred on subjects as diverse as tobacco use, patients' rights, and the development of the internet.[32]

Congress too has a policy-related stake in the judicial selection process. As a general proposition, legislators would prefer that courts adhere to the purposive agenda codified by prior Congresses, just as they expect courts in the future to be bound by the laws they enact today.[33] Current majorities also may have a particular interest in confirming judges who will not undermine preferred regulatory enactments.[34] Admittedly, the current majority party has the option to monitor judicial performance after the fact, at least with respect to certain high profile regulatory statutes that it wishes to see vigorously applied.[35] In addition, both parties

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policy preferences in lower courts by refusing to change agency behavior because of a loss in a particular district or appellate court).

[32] *See, e.g.*, Lorillard Tobacco v. Reilly, 533 U.S. 525 (2001) (adjudicating tobacco manufacturer's right to engage in outdoor and point-of-sale cigarette and cigar advertising); Pa. Psychiatric Soc. v. Green Spring Health Serv. Inc., 280 F.3d 278 (3d Cir. 2002) (adjudicating professional association's right to sue HMOs for impairing quality of health care provided by its members); *see also* United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (adjudicating extent of Government's ability to regulate access to internet). *See generally* Joseph A. Califano, *Yes, Litmus Test Judges*, WASH. POST, Aug. 31, 2001, at A23 (discussing role of federal courts as "powerful architects of public policy").

[33] *See, e.g.*, McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180, 185–86 (1999) (discussing risk that courts will try to impose their own policy preferences, subtly or profoundly altering a political compromise years after its enactment); John Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L.J. 565, 581 (1992) (suggesting that each enacting Congress wants its laws enforced and sympathetically applied into the future, and that courts can encourage sitting legislators to act carefully and deliberatively by interpreting earlier legislative products in a sensitive fashion).

[34] *See, e.g.*, *Senate Judiciary Comm. Hearings on Nomination of Susan W. Liebeler to be Judge for U.S. Court of Appeals for Federal Circuit*, 100th Cong. 1, 69–79 (1987) (reporting questioning of nominee on her role undermining enforcement of anti-dumping trade laws; nominee ultimately failed to receive a vote in full Senate); *Senate Judiciary Comm. Hearings on Nomination of Jefferson B. Sessions III to be U.S. District Court Judge for Southern District of Alabama*, 99th Cong. 2–3, 181–87, 196–203, 240–41 (1986) (reporting testimony on nominee's role undermining enforcement of Voting Rights Act; nominee ultimately rejected by Committee).

[35] The 1991 Civil Rights Act overrode all or parts of numerous Supreme Court decisions. *See* H.R. Rep. No. 102-40, pt. I, at 23–92 (1991) (reviewing action to override or modify results from ten Supreme Court decisions); *see also* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991) (discussing override statutes from 1967 to 1990). *But cf.* ROBERT A. KATZMANN, COURTS AND CONGRESS 71–74 (1997) (reporting very low congressional staff awareness of important statutory interpretation decisions by the D.C. Circuit).

are likely to be especially interested in reviewing judicial decisions that limit congressional power or authority.[36]

Yet while Congress remains free to invalidate judicial interpretations of a federal statute with which the majority disagrees, it is exceedingly difficult to secure such invalidations through the legislative process. This difficulty stems both from the lack of time and information needed to monitor statutory interpretation decisions and from the procedural and resource constraints that inhibit legislative success.[37] Further, when the Senate does not candidly consider the ideology or judicial philosophy of nominees, it tends instead to pursue alternative strategies that may be disingenuous if not unseemly, such as review of a nominee's past non-ideological indiscretions[38] or his asserted ethical misconduct in the private sphere.[39]

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[36] *See, e.g., Should Ideology Matter?: Judicial Nominations, 2001, Hearing Before the Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary*, 107th Cong. (2001) [hereinafter *2001 Hearing*] (statement of Chairman Schumer) (indicating plan to hold future hearing on "the significance of the Supreme Court's recent federalism decisions for the judicial selection process"); *Senate Committee Passes Bill Requiring State Compliance With ADEA*, DAILY LAB. REP., Sept. 20, 2001, at 1116–17 (reporting on bill that uses Article I Spending Clause authority to require that states waive their sovereign immunity from the ADEA if they are to receive certain federal program funds; bill would effectively circumvent Supreme Court decision in *Kimel v. Florida Board of Regents*).

[37] *See* Stefanie A. Lindquist & David A. Yalof, *Congressional Responses to Federal Circuit Court Decisions*, 85 JUDICATURE 61, 63–64, 68 (2001) (reviewing 966 committee reports accompanying every bill reported out of House, Senate, or conference committee from 1990 to 1998, and finding enacted bills responded to sixty-five circuit court cases (clarifying, codifying or overriding), and reports referred to total of 187 specific circuit court cases out of more than 200,000 decisions in that nine-year period). *See generally* JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES 41–42, 194 (1984) (discussing limitations on members' access to sophisticated policy information and on the political capital available to each senator or representative).

[38] *See, e.g.*, Adell Crowe, *People Watch*, USA TODAY, Sept. 29, 1987, at A4 (describing how local Washington, D.C. paper obtained list of videos rented by Supreme Court nominee Robert Bork's wife to investigate whether Bork might have watched X-rated films); Steven V. Roberts, *Ginsburg Withdraws Name as Supreme Court Nominee, Citing Marijuana 'Clamor'*, N.Y. TIMES, Nov. 8, 1987, at A1 (describing how reports of Douglas Ginsburg's marijuana smoking while a Harvard law professor led to his withdrawing as Supreme Court nominee). *See generally 2001 Hearing*, *supra* note 36, at 2 (statement of Chairman Schumer) (observing that "since the Bork fight in 1987, ideology, while still an important factor for the Senate, has primarily been considered sub-rosa, fostering a search for a nominee's disqualifiers that are more personal and less substantive").

[39] *See, e.g., Club Membership of Judicial Nominees: Hearing Before the Senate Comm. on the Judiciary*, 101st Cong. (1990) (reflecting concern of liberal interest groups and committee members about judicial nominees who belong to private clubs that discriminate against women or minorities); ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 239, 247–63 (2d ed. 1997) (discussing concerns fueled if not inspired by conservative anti-New Deal media and interest

In short, reliance by the Executive Branch and the Senate on political and ideological background has been a substantial element of the judicial selection process. When appropriately combined with a threshold concern for meritorious candidates, such reliance limits the pool of suitable individuals in a way that is not "neutral" but that is meant to serve democratic accountability interests. The White House and the Senate majority each has sought to shade the future philosophy of the judiciary toward its own broadly conceived public policy preferences. The fact that those preferences have often conflicted during our prolonged period of divided government has led each branch to emphasize the importance of tempering excesses by the other.[40] It is in this setting that presidents and senators seem to believe they can use partisanship and ideological background to help them anticipate the judicial behavior of current and prospective candidates for the federal bench.

B. *Political Background and Decisional Influences*

Insofar as the political branches are engaged in efforts to predict how judges will perform, it is worth asking whether these efforts have been successful. The answer, I think, is a somewhat qualified yes. The qualification involves a recognition that for many controversies reaching the federal courts, the applicability of a controlling legal rule or principle can be readily determined. Through discussion and reflection regarding the meaning of textual language, the relevance of judicial or agency precedent, and the persuasive force of logical reasoning, judges often engage in routine dispute resolution or correct clear errors made by a lower tribunal.

At the same time, many other legal disputes do not generate such clear answers. In this set of cases, plausible competing arguments based on "objective" rules or legal doctrine require judges to exercise considerable discretion when reaching their results. Such discretion may be called for particularly at the appellate and Supreme Court levels, where the parties, and their supporting interest groups, are likely to invest substantial resources to demonstrate the persuasive force of each law-based alternative.[41] Appellate judges themselves disagree as to how often such legal

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groups to reveal Senator Black's earlier membership in Ku Klux Klan as means of defeating his Supreme Court appointment).

[40] *See generally* Jon O. Newman, *Federal Judicial Selection: A Judge's View*, 86 JUDICATURE 10, 12 (2002) (discussing role of Senate in steering President's judicial appointments toward the middle, reflecting country's message to both political branches that "We are sort of in the middle."); Stephen B. Burbank, *Politics, Privilege & Power: The Senate's Role in the Appointment of Federal Judges*, 86 JUDICATURE 24, 26 (2002) (discussing how presidents' more distinct policy agenda in selecting judicial nominees has triggered increased attention by senators to those nominees).

[41] *See* Tracey E. George, *Court Fixing*, 43 ARIZ. L. REV. 9, 32 (2001) (discussing empirical support for hypothesis that appellate judges have greater decisionmaking discretion and are less constrained by doctrine than district court judges). Apart from occasional strategic behavior on appeal to delay inevitable outcomes, litigating parties are unlikely to spend tens or hundreds of

indeterminacy occurs.[42] Nonetheless, its relatively frequent occurrence provides scope for judges to rely, even if subconsciously, on their individual values or preferences.

In this regard, ample evidence exists that party affiliation is a significant predictor of voting patterns by federal judges. Since the early 1960s, an impressive array of empirical studies has tended to confirm that the political party of the appointing president or the judge makes a difference in a number of discrete subject matter areas. For example, it can be said with some confidence that appellate court judges appointed by Democrats are more likely than their Republican-appointed counterparts to cast votes favoring stronger regulation of the economy, construing generously employee protection statutes, and limiting the powers of prosecutors in criminal settings.[43]

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thousands of dollars unless they perceive a "close" legal question. *See generally* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4–5 (1984).

[42] *Compare* Charles E. Clark & David M. Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 YALE L.J. 255, 256 n.7 (1961) (reporting Judge Clark's estimate that for three hundred appeals he reviewed on the Second Circuit over a two year period, "clear one-way cases comprised at least 70%, while around 10% were highly original cases . . . [and i]n the remaining 20%, the outcome actually proved certain, but counsel might be forgiven for thinking they had a bare chance of success"), *and* Harry T. Edwards, *The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication*, 32 CLEV. ST. L. REV. 385, 409 (1983–84) (referring to the occasional "very hard" case), *with* Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 190–91 (1986) (maintaining that in appellate litigation, unclear cases—with textual uncertainty and credible contextual arguments for both sides—outnumber the clear cases), *and* Judith S. Kaye, *The Human Dimension in Appellate Judging: A Brief Reflection on a Timeless Concern*, 73 CORNELL L. REV. 1004, 1007–09 (1988) (suggesting she found frequent gaps and anomalies in statutory law).

[43] For examples of recent studies linking political affiliation to judicial behavior in the courts of appeals, see James J. Brudney, Sara Schiavoni & Deborah J. Merritt, *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675, 1715 tbl.II (1999) (finding that Democratic appointees to courts of appeals were significantly more likely than Republican appointees to favor unions' legal positions); Robert A. Carp et al., *The Voting Behavior of Judges Appointed by President Bush*, 76 JUDICATURE 298, 300 (1993) (finding significant party-related voting differences within areas of criminal justice, civil rights and liberties, and labor and economic relations); Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635, 1678–86 (1998) (finding significant party-related voting differences on wide range of issues); Jon Gottschall, *Reagan's Appointments to the U.S. Courts of Appeals: The Continuation of a Judicial Revolution*, 70 JUDICATURE 48, 51–54 (1986) (finding significant party-related voting differences in civil rights and civil liberties cases); Donald R. Songer & Sue Davis, *The Impact of Party and Region on Voting Decisions in the United States Courts of Appeals*, 43 W. POL. Q. 317, 324 (1990) (finding significant party-related voting differences on cases involving labor relations, criminal law, First Amendment, and civil rights issues). For a thoughtful review of the empirical literature linking presidential expectations to the performance of Supreme Court justices, see PERETTI, *supra* note 10, at 111–17.

These empirical studies are hardly uniform, and they are subject to methodological limitations if not criticism. There is some research concluding that political party lacks significant predictive power in comparable areas of substantive law.[44] In addition, studies identifying partisan-based differences in voting behavior have often focused on highly controversial or divisive cases, raising potential problems of selection bias.[45] Other studies have examined the behavior of judges appointed by a single president, or reviewed decisions in a compressed time frame, thereby ignoring the possibly substantial variation in political saliency for a particular legal subject matter area over decades.[46] Finally the studies indicating that partisan affiliation has some predictive value address trends among cohorts of judges who have either Democratic or Republican affiliation; they do not purport to identify how an individual judge will vote in a specific case.

Despite these caveats, there is now far too much evidence to deny that the political background of judges has helped predict patterns of voting in the federal courts. Upon reflection, it would be surprising if the results were otherwise. Executive branch advisers, senators and their staffs, and various aligned interest groups[47] would not continue to invest substantial resources and energies in the political and ideological aspects of judicial selection if they did not accurately perceive that those

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[44] *See, e.g.*, Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 281 (1995) (finding no difference between judges appointed by Republican and Democratic presidents in three district courts with respect to their treatment of civil rights cases); Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1466 (1998) (finding no significant variance between district judges appointed by Republican and Democratic presidents regarding decisions on constitutional validity of federal sentencing guidelines); Donald R. Songer & Susan Haire, *Integrating Alternative Approaches to the Study of Judicial Voting: Obscenity Cases in the U.S. Courts of Appeals*, 36 AM. J. POL. SCI. 963, 977–79 (1992) (finding political party of appointing president not to be a significant determinant of federal appellate judge behavior in obscenity cases).

[45] *See* Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 31–34 (2002) (criticizing studies that attempt to make inferences about the "state of the law" by focusing on a few key cases); Merritt & Brudney, *supra* note 8, at 115–16 (indicating how analysis of published decisions alone gives rise to erroneous conclusions); Ashenfelter et al., *supra* note 44, at 258–59 (discussing problems of selection bias in studies of published decisions).

[46] *See* Lawrence Baum, *Comparing the Policy Positions of Supreme Court Justices from Different Periods*, 42 W. POL. Q. 509, 512–16 (1989) (examining difficulty of comparing Supreme Court votes on civil liberties issues during Burger Court era versus period from 1946 to 1969); Brudney, Schiavoni, & Merritt, *supra* note 43, at 1738–39, 1763 (recognizing obstacles to comparing appellate court votes on labor relations issues during period since early 1980s versus period from 1946 to mid-1970s).

[47] *See* David G. Savage, *Court Nominee Warfare Opens Senate*, L.A. TIMES, July 6, 2001, at A18 (reporting on Tom Jipping's Free Congress Foundation (Republicans) and Nan Aron's Alliance for Justice (Democrats) as powerful groups that have focused on judicial selection since late 1970s).

aspects had some impact on judicial decisionmaking. That same perception also seems implicit in the perspective adopted by judicial scholars who expect the federal courts as a whole to be broadly shaped by the prevailing political consensus,[48] and who are prepared to criticize judges as "activist"—in either liberal or conservative directions—based on assertedly substantial departures from the values embodied in that consensus.[49]

To be sure, there are risks that undue emphasis on political or ideological background in the selection process may threaten respect for the judicial enterprise.[50] At the same time, a proper appreciation for such background when assessing the factors that contribute to decisionmaking may help deepen our understanding of how legal doctrine develops or is applied. A recent empirical example illustrates this latter point.

In studying over 1100 labor-management relations cases decided by the courts of appeals between 1985 and 1992, Deborah Merritt and I discovered that judges appointed by Democratic presidents were significantly more likely than Republican-appointed judges to support the union's legal position *in unpublished cases*.[51] Assuming arguendo that the circuit courts restrict publication to decisions that have

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[48] *See* ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 230–31 (3d ed., revised by Sanford Levinson 2000) (observing that over two hundred years, Court's interests and values have often shifted in the presence of changing national conditions, and suggesting that "judges have often agreed with the main current of public sentiment because they were themselves part of that current [more than] because they feared to disagree with it"); *2001 Hearing*, *supra* note 36, at 57–60 (testimony of Prof. Cass R. Sunstein) (advocating importance of having an appropriate ideological mix of liberal and conservative justices on Supreme Court).

[49] *See generally* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 933–47 (1973).

[50] Partisan-related attention within the legislative and executive branches could seek to produce more than general predictive value through litmus test screening that asks candidates to make advance commitments on specific issues of constitutional or statutory interpretation. Notwithstanding ample accusatory rhetoric from both political parties, that type of screening appears not to have been adopted. Senators and presidents have publicly eschewed such an approach, fearing that it would compromise the principled core of judicial decisionmaking by undermining the idea that courts should engage in a relatively objective effort to apply legal rules to particular facts. *See, e.g.*, *2001 Hearing*, *supra* note 36, at 30 (statement of Sen. Hatch) (contending that "the Senate's responsibility to provide advice and consent [should] not include an ideological litmus test because a nominee's personal opinions are largely irrelevant so long as the nominee can set those opinions aside and follow the law fairly and impartially as a judge"); Nat Hentoff, *To Get a Supreme Court Seat*, WASH. POST, Aug. 14, 1999, at A17 (reporting candidate George W. Bush's statement that he would not require an ideological litmus test for the Supreme Court). *But cf. id.* (reporting candidate Bill Clinton's 1992 statement to Bill Moyers that he would want his first Supreme Court appointee to be a strong supporter of *Roe v. Wade*, although it "makes me uncomfortable" to be taking such a litmus test position).

[51] Merritt & Brudney, *supra* note 8, at 110 tbl.X. For an explanation of how we controlled for various other influences in our regression equation, see *id.* at 108–09.

precedential value or "add to the body of law,"[52] it seems that Democratic judges are favoring unions (or Republican judges disfavoring them) in cases that apply settled legal standards in an uncontroverted factual context. Does this mean that federal judges are pre-determining outcomes in some "unprincipled" way based on their prior political affiliations? I seriously doubt it. What is more likely, as Merritt and I suggested, is that judges simply differ in the way they apply the law and that some of these differences can be generalized. Thus, a Democrat-appointed judge may "see" an unlawful retaliatory motive when an employer disciplines a union supporter during an election campaign, while a Republican-appointed judge may not see such a motive on the same facts.[53] Or a Republican-appointed judge may regard management's unyielding positions during collective negotiations as legitimate "hard bargaining," while a Democrat-appointed judge views the same actions as unlawful bad faith.

Such perceived differences in the implementation of a declared rule of law are in one sense unavoidable, as judges invoke pliable legal standards to assess equivocal human conduct. At the same time, Merritt and I are hardly alone in observing that "law" in the lower federal courts often consists of extending these rules or standards to relatively novel factual settings. Insofar as judges diverge in predictable ways when applying well rooted legal principles, they demonstrate that political experience or perspective can inform the meaning of settled doctrine while contributing to even the most routine judicial decisions.

Recognizing that such experience may at times have a more than anecdotal effect need not jeopardize our commitment to the ideal of judges acting independently to apply established legal rules. It may, however, call for greater candor in acknowledging the politically-related factors that can affect such independent performance. Nor does enhanced public understanding need to produce a more skeptical or cynical view of judicial decisionmaking. Increased awareness by litigants of the ways in which judges approach the same facts from different perspectives could encourage more thoughtful attention to the development of those facts in court, as well as to the underlying meaning of the legal rules.[54] Such awareness might also

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[52] *Id.* at 76–77 (reviewing publication rules that are comparable in all circuits). *But cf. id.* at 112–13 (discussing substantial variation in actual publication rates among the courts, even after controlling for caseload and numerous other factors, suggesting that judges apply similar publication criteria in very different ways).

[53] *See id.* at 116.

[54] That thoughtful focus might be augmented through some relaxation of the limits on publication that have been adopted by the circuit courts. For example, one troubling finding in the Merritt & Brudney study of over 1100 published and unpublished cases was that unpublished decisions increasingly rejected unions' legal claims over the course of the seven years from 1987 to 1993, while published opinions showed no such tendency. Accordingly, it is likely that litigants who relied exclusively on published opinions may have received inaccurate signals about judicial trends, even if those trends were simply that courts over this seven year period applied existing legal standards in a way that increasingly favored employers. *See* Merritt & Brudney, *supra* note 8, at 110 tbl.X, 110–11, 117–18.

encourage judges to become somewhat more self-conscious, and mutually communicative, about the perspectives they bring to their deliberative enterprise.

C. *Personal Values and Diversity*

Although social scientists studying judicial behavior have devoted much of their attention to the influence of political background and experience, it should be apparent that each judge's broader personal makeup also influences her decisionmaking calculus.[55] Justice Cardozo in his 1921 Storrs Lectures famously remarked about the role played by "the complex of instincts and emotions and habits and convictions, which make the man."[56] In sifting through competing arguments, judges inevitably draw on this welter of experiences and attitudes as part of their effort to render a just legal result.

Federal judges have become increasingly open, if not entirely comfortable, acknowledging the value-laden aspects of judging. In a 1970s study of thirty-five appellate court judges from three circuits, almost all indicated on background that they regarded their personal views of justice as important in deciding cases, even when there was clear and relevant precedent.[57] More recently, appellate judges have been willing to express "on the record" their views that personal values are, and ought to be, part of their decisionmaking enterprise. These judges insist that written opinions, analyzing language and precedent based on well-established interpretive norms, are central to the judiciary's legitimate role in our legal culture.[58] Yet they also

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[55] In the first part of this section, I draw upon research and observations from a recent article coauthored with Corey Ditslear. *See* James J. Brudney & Corey Ditslear, *Designated Diffidence: District Court Judges on the Courts of Appeals*, 35 LAW & SOC'Y REV. 565, 569–71 (2001).

[56] BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 167 (1921); *see also* Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274, 278–79 (1929) (describing role of subjective intuitions and insights in rendering judicial decisions, and analogizing judge's role in exercising those faculties to a gambler or short story detective).

[57] J. WOODFORD HOWARD, JR., COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS, at xix, 164 (1981) (presenting findings on political values and role perceptions based on not-for-attribution interviews with active and senior judges from Second, Fifth, and D.C. Circuits between 1969 and 1971; thirty-one of thirty-five judges reported their personal views of justice were very important (seventeen) or moderately important (fourteen) to their decisionmaking, while clear and relevant precedent was very important (thirty-two) or moderately important (two) for thirty-four of thirty-five). In cases where the legal rules were uncertain, itself a matter involving varied individual perceptions, these judges ranked their personal views of justice as "very important," according them slightly more weight than the closest applicable circuit court ruling. *See id.* at 164–65.

[58] *See, e.g.*, FRANK COFFIN, THE WAYS OF A JUDGE 55–57, 201–02 (1980) (discussing importance of authority, interpretive rules, and "the constraint of writing"); Shirley S. Abrahamson, *Judging in the Quiet of the Storm*, 24 ST. MARY'S L.J. 965, 987–88 (1993) (discussing importance

maintain that their individual perceptions of justice and fairness, as well as the background experiences that helped shape those perceptions, will influence their own reasoning and contribute to the dynamic of deliberation among colleagues.

Thus, for example, some judges advocate a specific role for the value of compassion in good judging, by urging more expansive interpretation of "compassionate" statutory standards such as those that suspend deportation in cases of "extreme hardship" or that prohibit discrimination against employees based on certain immutable personal characteristics.[59] Other judges have stated that their personal backgrounds and experiences affect how they decide cases,[60] and that they are at times influenced by the experiences of fellow judges as part of collective decisionmaking.[61] One of the judicial presenters at this Symposium has invoked Cardozo to describe the medley of attributes and exposures among appellate judges as fostering a "balance of eccentricities" that helps generate more reliable legal standards.[62]

The bipartisan interest in increased diversity on the federal bench is a further indication that individual values are perceived as contributing in important respects to judicial decisionmaking. Presidents from both parties and leaders of the bar have advocated the inclusion of more female and minority judges on federal courts as enhancing the quality of the judicial work product.[63] Greater diversity enables judges

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of precedents and principled decisionmaking in protecting judiciary against charges of being arbitrary, irrational, and personal).

[59] *See* Mary M. Schroeder, *Compassion on Appeal*, 22 ARIZ. ST. L.J. 45, 49–51 (1990); *see also* Stephen Reinhardt, *Dialogue: Good Judging*, 2 GREEN BAG 2d 299, 301–02 (1999) (advocating compassionate consideration in individual cases). Apart from the "liberal" value of compassion, more "conservative" values like efficiency have also been ascribed to judicial decisionmaking in some settings. *See generally* RICHARD A. POSNER, OVERCOMING LAW 123–26 (1995); Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 318–19 (1997).

[60] *See* Reinhardt, *supra* note 59, at 302 (discussing how the experience of growing up Jewish during time of widespread anti-Semitism contributed to his sensitivity toward rights of minorities and underprivileged people); Patricia M. Wald, *Essay: Thoughts on Decisionmaking*, 87 W. VA. L. REV. 1, 12 (1984) (discussing how each judge's personal background, experiences, and former involvements are part of her intellectual capital that is "bound to influence [her] notions of how a case should be decided").

[61] *See* Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217, 1217 (1992) (reporting that Justice Marshall's presence as a colleague and friend "profoundly influence[d]" her); Reinhardt, *supra* note 59, at 302 (referring to impact that African American judges on Ninth Circuit have had on their colleagues' view of the law).

[62] *See* Abrahamson, *supra* note 58, at 985 (quoting with approval CARDOZO, *supra* note 56, at 177: "The eccentricities of judges balance one another [and] out of the attrition of diverse minds is beaten something which has a consistency and uniformity and average value greater than its component elements.").

[63] *See* President Clinton, *Remarks to the American Bar Association*, Aug. 9, 1999, *reprinted in* 35 WKLY. COMP. PRES. DOC. 1600 (arguing that his appointments to the federal bench are the

to "amplify and flush out areas of rational disagreement" when applying legal rules, it enhances their understanding about the "subtle influences of race, ethnicity or gender," and it "enrich[es] the judicial conversation by adding less familiar points of view."[64] Such diversity also is seen as likely to improve the public's perception of the courts, by increasing the confidence of female and minority litigants, jurors, and attorneys in the basic fairness and legitimacy of the legal system.[65] The continuing emphasis on diversity reflects an appreciation that judges with contrasting personal backgrounds and experiences will express and reflect those perspectives during collegial decisionmaking that ultimately yields a stronger and more respected set of legal rules.

Finally, quite apart from the perceptions of political leaders, practicing attorneys, and judges themselves, scholars studying judicial behavior have long maintained that personal background factors have a demonstrable impact on the decisionmaking process. In particular, social scientists and law professors hypothesize that pre-court life experiences play a prominent role in shaping the individual values and policy

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most diverse ever and have garnered the strongest ABA ratings of any president's in nearly forty years thereby "shatter[ing] the destructive myth that diversity and quality do not go hand in hand"); Scott Shepard, *On the Issues*, ATLANTA J. & CONST., Mar. 10, 1992, at A11 (reporting President Bush's urging that Senate Republicans "seek out qualified women and minority candidates" for the federal bench, and candidate Clinton's belief that "our nation is best served by a judiciary which is representative of the great diversity that comprises our country."); H.T. Smith, *Toward a More Diverse Judiciary*, A.B.A. J., July 1995, at 8 (discussing ABA's recent passage of a resolution encouraging the appointment of people of color to the judiciary, and reporting National Bar Association President's statement that "[a] more diverse judiciary will minimize prejudice and insensitivity from judges, and engender more respect from the public"); *see also* Lynn Hecht Schafran, *At Issue: Supreme Court Nominees: Should Race and Gender be Factors in Choosing Justices?*, A.B.A. J., Sept. 1991, at 8 (reporting Justice Brennan's statement that "there should be 'diversity in many respects' on the Court, including geography, politics, race, gender, and religion," and adding "[t]hese are all segments of our pluralistic society, and I think people are a little more comfortable when they see a broadly representative group. It is more than a symbol. People bring different experiences and insights to their work.").

[64] *Report of the Working Committees to the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts*, 1997 ANN. SURV. AM. L. 124, 180–81 [hereinafter *Second Circuit Report*]; *see* Theresa M. Beiner, *What Will Diversity on the Bench Mean for Justice?*, 6 MICH. J. GENDER & L. 113, 150 (1999) (contending that diversity increases the prospect that judges will be able to see and assess the differing perspectives of the many parties to federal litigation).

[65] *See Second Circuit Report*, *supra* note 64, at 179–80; *see also The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force*, 67 S. CAL. L. REV. 745, 784 (1994) (reporting that 58% of female judges and 65% of female lawyers surveyed believe the male-dominated bench in the Ninth Circuit favored male practitioners, whereas 9% of male judges and 14% of male attorneys shared that belief).

preferences of judges, and that such biographical factors can be useful in predicting judicial decisions.[66]

There is notably less supporting evidence on this score than exists with respect to prior political affiliation.[67] It may be that personal attributes and experiences have been studied less intensively than political background. For instance, certain personal attributes, such as being female or black, may not yet have occurred with sufficient frequency among federal judges to allow for in-depth empirical analysis over extended time periods.[68] In addition, some of these non-political factors are more difficult to analyze in quantitative terms. Certain aspects of pre-judicial experience, such as having held elected office, may at times be too heterogeneous or complex to be classifiable for substantive law purposes.[69]

Still, the relatively soft evidence regarding the predictive value of social background factors does not mean such evidence is nonexistent. A number of studies have shown a significant association between judicial voting patterns and certain personal or professional background factors, including gender,[70] race,[71]

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[66] *See, e.g.*, Jilda M. Aliotta, *Combining Judges' Attributes and Case Characteristics: An Alternative Approach to Explaining Supreme Court Decisionmaking*, 71 JUDICATURE 277 (1988); Sisk et al., *supra* note 43; C. Neal Tate & Roger Handburg, *Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior, 1916–88*, 35 AM. J. POL. SCI. 460 (1991).

[67] *See* George, *supra* note 41, at 16–31 (reviewing research studying the possible influence on judicial behavior of various personal attributes and social background factors).

[68] Only eight females had ever been appointed to the federal bench at the circuit or district court levels before 1977. *See* Amy Singer, *Numbers Too Big to Ignore*, AM. LAW., Mar. 1999, at 5, 6. By 1992, there were 68 female district court judges and by 2001 that number had increased to 130. Similarly, the number of female appellate court judges rose to 22 in 1992 and to 35 in 2001. The number of African American federal district judges was 34 in 1992 and 71 in 2001; the number of African American appellate judges was 9 in 1992 and 12 in 2001. *See* Goldman et al., *supra* note 13, at 250.

[69] *See, e.g.*, Brudney & Ditslear, *supra* note 55, at 589–90 (reporting that elected office experience was associated in divergent ways with the voting patterns of regular appellate judges and designated district court judges, and suggesting that differing nature of the elected offices held by these two groups of judges may help account for the divergence).

[70] *See* Brudney, Schiavoni & Merritt, *supra* note 43, at 1756 (finding that female Republican appointees to appellate bench were significantly more likely to support the union's legal position than their male Republican colleagues); Nancy E. Crowe, Gender and the Courts: A Look at the Diversification of the Federal Bench (1997) (unpublished paper delivered at Conference on the Scientific Study of Judicial Politics) (on file with author) (finding that female appellate court judges were significantly more likely to vote for plaintiffs in sex discrimination cases than male judges); Sue Davis et al., *Voting Behavior and Gender on the U.S. Courts of Appeals*, 77 JUDICATURE 129, 131–32 (1993) (finding that female appellate court judges were significantly more supportive of employment discrimination claimants than their male counterparts, although no significant gender-related differences were found in obscenity or criminal procedure cases).

[71] *See, e.g.*, Jon Gottschall, *Carter's Judicial Appointments: The Influence of Affirmative Action and Merit Selection on Voting on the U.S. Courts of Appeals*, 67 JUDICATURE 165, 172–73

religion,[72] age,[73] status of college or law school attended,[74] experience as a law professor,[75] experience in elected office,[76] and experience as a prosecutor.[77]

(1983) (reporting that black Carter appointees voted for criminal accused and for prisoners 79% of the time compared to 53% by white Carter appointees); Susan Welch et al., *Do Black Judges Make a Difference?*, 32 AM. J. POL. SCI. 126, 407 (1988) (analyzing a northeastern city's criminal court, and concluding that "in the crucial decision to incarcerate, having more black judges increases equality of treatment").

[72] *See, e.g.*, FRANK J. SORAUF, THE WALL OF SEPARATION: THE CONSTITUTIONAL POLITICS OF CHURCH AND STATE 206–20 (1976) (examining appellate and trial court decisions addressed to separation of church and state, and finding that Jewish and Catholic judges differ significantly in their approaches); Brudney, Schiavoni & Merritt, *supra* note 43, at 1754 (examining appellate court decisions addressed to labor-management relations, and finding that Catholic and Jewish judges were significantly more likely than their colleagues to favor unions in certain areas); Kenneth N. Vines, *Federal District Judges and Race Relations Cases in the South*, 26 J. POL. 337, 353 (1964) (examining district court decisions on race relations, and finding significant differences between Catholics and "orthodox Protestants").

[73] *See* Brudney, Schiavoni & Merritt, *supra* note 43, at 1754 n.238 (finding that older appellate court judges were more likely to rule against the union on certain types of labor relations issues); Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491, 499 (1975) (finding that older appellate court judges were more likely to favor conservative (pro-employer) outcomes in labor cases and to rule conservatively in a number of other areas).

[74] *See* Brudney, Schiavoni & Merritt, *supra* note 43, at 1750–51 (finding that judges who attended more elite colleges were significantly more likely to reject the union's legal position); Stuart S. Nagel, *Multiple Correlation of Judicial Backgrounds and Decisions*, 2 FLA. ST. U. L. REV. 258, 267, 270 (1974) (finding that judges who attended low-tuition law schools (as opposed to high-tuition schools) were more likely to favor prosecution over defense in criminal cases); C. Neal Tate, *Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946–1978*, 75 AM. POL. SCI. REV. 355, 363 (1981) (finding that justices who attended more prestigious colleges were more likely to support liberal outcomes in cases involving economic regulation).

[75] *See* George, *supra* note 41, at 39–59 (finding that academic judges appointed by more ideologically-oriented presidents—FDR and Reagan—were among the most consistently ideological of all appellate judges, and that academics on federal bench generally publish more majority opinions, and exert more innovative influence on the law, than their non-academic counterparts).

[76] *See* Paul Brace & Melinda Gann Hall, *Neo-Institutionalism and Dissent in State Supreme Courts*, 52 J. POL. 54, 57–58 (1990) (identifying a connection between elected office experience and a propensity to vote with the majority on an appellate court); S. Sidney Ulmer, *Dissent Behavior and the Social Background of Supreme Court Justices*, 32 J. POL. 580, 588, 597 (1970) (same); Brudney, Schiavoni & Merritt, *supra* note 43, at 1753 (finding that appellate judges who had held elected office before joining the bench were more likely to support union legal positions than their counterparts who lacked this experience); Tate, *supra* note 74, at 363 (finding that justices who had held elected office were more liberal on economic regulation questions).

[77] *See, e.g.*, Richard E. Johnston, *Supreme Court Voting Behavior: A Comparison of the Warren and Burger Courts*, *in* CASES IN AMERICAN POLITICS 108–09 (Robert L. Peabody ed., 1976) (finding that justices with prior prosecutorial experience were more conservative in criminal

Moreover, it seems reasonable to anticipate that as the federal judiciary continues to become more diverse, these and other social background factors will assume a stronger role as indicators of judicial voting behavior.[78]

Once again, it is possible to view the influence of a judge's personal or professional background as a threat to judicial independence in that it detracts from our dominant lawyerly paradigm of judicial decisionmaking as the reasoned elaboration of more or less objectively discernible doctrine and values.[79] As is the case with political affiliation, however, the relationship between objective legal rules and subjective pre-judicial experiences reflects synergy as well as conflict. A second empirical example illustrates how certain professional experiences may serve to deepen judicial appreciation for doctrine in ways that help shape the reasoned elaboration and application of legal rules.

In a separate analysis of the 1100-plus labor-management relations cases described earlier,[80] my co-authors and I found that the thirty-four appellate court judges who had represented management in National Labor Relations Act (NLRA)[81] matters before joining the bench were significantly more likely to *support* union legal positions in the courts of appeals than their colleagues.[82] In other words, judges with management-side experience were more likely to vote *against* the interests of their former clients than were their counterparts, almost all of whom were judges with no NLRA experience of any kind.[83]

Our explanation for this intriguing set of findings invoked the distinctive nature of collectivist and anti-competitive policies underlying the NLRA—policies that have become increasingly anomalous in a legal culture heavily oriented toward individual

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procedure and economic regulation cases); Nagel, *supra* note 74, at 266–67 (finding that judges with prosecutorial experience were more likely to support the prosecution's position).

[78] *See* Patricia M. Wald, *A Response to Tiller and Cross*, 99 COLUM. L. REV. 235, 252 n.65 (1999) (expressing this belief).

[79] *See, e.g.*, Abrahamson, *supra* note 58, at 982–88; David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987).

[80] *See* Brudney, Schiavoni & Merritt, *supra* note 43, at 1697. My co-authors and I utilized as the unit of measurement for our study the issue rather than the case as a whole: each judicial participation consisted of an individual judge's vote for or against the union's legal position on a single issue in a case appealed from the Labor Board. *See id.* at 1699–700.

[81] National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (1994)).

[82] See Brudney, Schiavoni & Merritt, *supra* note 43, at 1741–48 for a full discussion and analysis of these findings.

[83] Our findings were especially robust when the judges who had represented management also had extensive and varied NLRA experience. Typically, these judges spent a considerable amount of time (five to twenty years) with a private firm in which an important part of their practice involved labor relations work. Their acquisition of NLRA experience in government or academic settings generally occurred over a much shorter time period, either at the start of their career or after a number of years in private practice.

rights and the free market. We suggested that pre-judicial familiarity with the Act had bred greater judicial respect for its protective doctrinal scope, even though the familiarity was developed while protecting employer interests.[84] Attorneys who have performed substantial work representing management before the Labor Board and the courts come to understand the NLRA's practical realities and its now-unusual, albeit modest, policy goals.[85] These attorneys apparently are better prepared to breathe life into the Act's purposes and priorities when interpreting its legal rules once they are separated from a client-based, ideological perspective.[86] In this setting, social background factors enhance the traditional legal process model of judicial decisionmaking. Special familiarity with a statute's purposes, generated by personal background, helps to create or refine doctrinal understanding.[87]

In sum, the ideal of judges applying legal rules through a neutral and wholly impersonal reasoning process is just that—an ideal. The fact that our aspirational view of judicial independence fails to contemplate a role for political and personal background factors does not mean we should ignore or minimize the role those factors actually play. We would do better to recognize as descriptively accurate the contention that judges may be predictably influenced in various ways by their pre-judicial experiences and then treat that subject as an appropriate focus for increased scholarly and public attention. Insofar as prior political affiliation is associated on

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[84] *Id.* at 1742–45. We considered the alternative hypothesis that "client skepticism" (derived from participating in strategic appeals of doubtful merit) better explained our robustly significant findings, but rejected it for several reasons, including the fact that the very small number of former union attorneys on the appellate bench were also more supportive of some union claims than other judges. *See id.* at 1747–48.

[85] It is particularly noteworthy that the pro-union effect of management-side experience was significant for the subcategory of claims that involved misconduct by employers in the course of negotiations with a recognized union. *See id.* at 1725 tbl.V, 1726–27. Those claims raise issues that are at once closely tied to collective bargaining and distinctly at odds with the individual rights orientation of contemporary legal culture. Accordingly, it seems reasonable to infer that judges familiar with the unusual nature of policy objectives promoting the collective bargaining process are especially prepared to support the union's position on such bargaining-related claims. *See id.* at 1762.

[86] We also considered a slightly different version of this hypothesis—that judges with management experience were "captured" by the Act based on their years of litigation before the Board, because their own private practice thrived when the Act was energetically enforced, and they inevitably developed a more expansive attitude toward the Act's protections. We concluded, however, that this "capture" hypothesis was merely a variation of our "familiarity breeds respect" hypothesis. *See id.* at 1745, n.211.

[87] We suggest that this "personal familiarity breeds respect" hypothesis may apply to other areas of relatively specialized law, notably the performance of federal circuit judges in patent law cases. *See* Brudney, Schiavoni & Merritt, *supra* note 43, at 1748–50 and sources cited therein. One modest practical consequence of such findings could be to encourage more sophisticated training on specialized older statutes for sitting judges who lack personal familiarity or prior exposure. *See id.* at 1764.

average with a tendency to construe certain legal rules generously or restrictively, this reflects in part the impact of the politically accountable branches in shaping the broad contours of judicial performance. To the extent that distinctive personal attributes or professional experiences also affect judicial voting patterns, they too contribute—in often subtle ways—to doctrinal development through both individual and collective decisionmaking.

Two important purposes may be served by encouraging recognition of how judges' political and personal backgrounds help shape the direction of federal law. First, such recognition will make the legal community and the interested public more attentive to the ways in which development of substantive law deviates from our normative ideal. This increased awareness should in turn enable parties and their advocates to become more sophisticated participants in the judicial enterprise. It may also enable judges to become more cognizant in determining how best to appreciate, subordinate, or harness the various influences associated with their own background experiences and individual values.

Publicizing specific aspects of these departures from our normative ideal may also serve a second purpose: helping to make the departures themselves more even-handed. In this regard, diversity on the federal bench is important not because we *want* women, minorities, or former management-side lawyers to approach doctrinal matters in identifiably different ways, but because judges with distinctive backgrounds may well approach certain matters from different vantage points whether we want them to or not. Through appropriately tempered disclosure of such realities, we may encourage a more balanced, if not tolerant, public and political attitude toward the judicial selection process.

As techniques and methods for studying judicial behavior become more sensitive, the body of evidence indicating that judges are in some sense "influenced" by political and personal background factors seems likely to grow. At the same time, there will continue to be concerns that emphasis on the role played by such factors may threaten the courts' legitimacy by undermining traditional perceptions of judges as impartially applying law to facts. Whether the American public actually relies on or requires such perceptions in order to maintain respect for the judiciary as an independent institution is a separate question beyond the scope of this article, although it is not clear that the public thinks about federal courts in these terms.[88] But given that political and personal influences on a judge's habits of thinking create

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[88] *See, e.g.*, PERETTI, *supra* note 10, at 163–77 (criticizing from empirical standpoint the conventional wisdom that public support for the Supreme Court reflects a perception of that institution as exalted or impartial); Gregory A. Caldeira, *Neither the Purse Nor the Sword: Dynamics of Public Confidence in the Supreme Court*, 80 AM. POL. SCI. REV. 1209, 1223–24 (1986) (concluding that public support for the Court as an institution depends on cumulative agreement with specific public policies vindicated in its decisions, which changes over time, and that "dynamics of aggregate support for the Court bear a remarkable resemblance to those for Congress and the presidency").

some tension with traditional doctrinally-based notions about judicial independence, it is useful to be recalibrating those notions.

II. THE CONSTRAINTS OF LEGISLATIVE CONTEXT

In addition to the impact of personal and political background, the independence of judicial actors also may be affected by the interpretive methodologies these actors bring to their decisionmaking. It is worth considering, at least provisionally, how different interpretive approaches may enable judges to be more, or less, independent when applying the laws that Congress has enacted.

A. *Statutory Interpretation and Judicial Dependence*

The principal focus of federal courts today is the interpretation of federal statutes. I refer especially to the comprehensive regulatory schemes that impose a durable network of rules and standards in a particular subject matter area, often administered in part by a federal agency with stipulated enforcement powers.[89] When these statutes threaten the constitutional rights of individuals or arguably impinge on the constitutional powers and prerogatives of the states, federal courts are expected to exercise independent judgment to resolve the consequent disputes.[90] Assuming, however, that there is no need to review the constitutionality of a given comprehensive statute or any of its provisions, the designated judicial role is the more *dependent* task of applying faithfully the law Congress has enacted, *i.e.*, implementing the Article I authority exercised by the legislative branch.

Members of Congress from both sides of the aisle insist regularly, and with rhetorical flourish, that the function of judges is to interpret the law rather than create it.[91] The notion that judges are confined by the statute, and obligated to implement its

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[89] *See, e.g.*, Clean Air Act, Clean Water Act, Food, Drug & Cosmetics Act, Securities Acts of 1933 and 1934, Title VII of Civil Rights Act, Age Discrimination in Employment Act, NLRA, Fair Labor Standards Act. *See generally* William N. Eskridge, Jr. & John Ferejohn, *Super-statutes*, 50 DUKE L.J. 1215 (2001). My conception of a comprehensive regulatory statute differs from the Eskridge and Ferejohn "super-statute" in certain respects.

[90] *See generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 545 (2001); Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803, 851 (1994).

[91] *See, e.g.*, *2001 Hearing*, *supra* note 36 (statement of Sen. Hatch):

> The role of federal judges is, quite simply, to apply the written law, be it the Constitution or enacted legislation, to the case before them. But when federal judges deviate from the written law, and decide cases based on their own policy preferences or views of what is just or right, they in effect make up laws of their own despite the lack of legitimate authority for doing so.

true meaning, constitutes an important limitation placed on judicial independence. This limitation relates to the risk that too much independence in the statutory interpretation arena transforms judges into policymakers, a role that is deemed suspect under our separation-of-powers scheme when Congress has spoken. We want federal judges to be independent in applying a statute consistently over time and without regard to the privilege or stature of parties who appear before them. At the same time, we fear the possibility that judges will "bend statutes to reflect their own political preferences,"[92] for we have concerns that such preferences may well be at odds with the political choices reflected in the statutory text.

Of course, "interpreting the law" is not as simple as it sounds. Because statutory language is often imprecise or inconclusive, and the circumstances of its application often unanticipated or unforeseeable by its authors, judges inevitably engage in something beyond mere logical deduction when construing a statute's verbal formulations. In this setting, several theoretical frameworks have emerged with respect to how best to perform the relatively *dependent* judicial role of achieving fidelity to congressionally enacted law.

For present purposes, I refer to three dominant approaches. The first, textualism, focuses almost exclusively on the words Congress has enacted, relying on ordinary usage, dictionary definitions, canons of construction, and harmonization with similar language in other laws or in other provisions of the same statute.[93] The second approach, dynamic interpretation, recognizes the primacy of the text, but suggests that when faced with ambiguous or unclear language, courts should be willing to apply statutes dynamically, rendering the statute effective by taking account of contemporary problems and circumstances including post-enactment changes in

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See also, e.g., 140 CONG. REC. 18,675 (1994) (statement of Sen. Thurmond) (quoting with enthusiasm Judge Breyer's statement at his Supreme Court nomination hearing that "[a] judge should . . . try to remember that what he is trying to do is interpret the law that applies to everyone, not enunciate a subjective belief or preference"); *Nomination of David Souter to be Associate Justice of the Supreme Court of the United States: Hearings Before Senate Comm. on the Judiciary*, 101st Cong. 29 (1990) (statement of Sen. DeConcini) (expressing hope that he will find Supreme Court nominee Judge Souter to be "a jurist who is respectful of precedent, rather than a jurist who is on a mission to impose his personal beliefs or hidden agenda on the country through the broad, sweeping opinions that he may write"); *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Judiciary Comm.*, 100th Cong. 667–68 (1987) (statement of Sen. Kennedy) (expressing deep concern that nominee would "uproot decades of settled law in order to write his own ideology into law").

92 William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671, 678 (1999).

93 *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983). For an example of textualism deftly applied by the Court, see *West Virginia University Hospitals v. Casey*, 499 U.S. 83, 88–101 (1991) (majority opinion by Justice Scalia).

societal, political, and legal conditions.[94] Finally, intentionalism, like dynamic interpretation, is committed to the primacy of text, but in the face of linguistic uncertainty it seeks to resolve the interpretive question at hand based on evidence of the enacting Congress's intent regarding that question, or to discover the interpretation that best furthers the original purposes of the legislation.[95]

Federal courts generally can be seen as applying a complex amalgam of all three approaches when deciding particular cases,[96] although certain individual judges have effectively embraced textualism or intentionalism in their opinion-writing.[97] My focus here is not in addressing the spirited, ongoing debate among judicial and scholarly advocates for these competing theories of statutory interpretation. Rather, I seek to explore how the ideal of encouraging relative judicial dependence in the statutory interpretation arena may be strengthened, or diluted, under each of these theories. Bearing in mind the comprehensive federal regulatory schemes that dominate our current statutory landscape, it is worth examining the extent to which textualism, dynamic interpretation, and intentionalism suggest differing perspectives on the role of an independent judiciary.

B. *Textualism and Indifference Toward Legislative Purpose*

Initially, textualism seems a straightforwardly dependent approach to statutory interpretation. Congress as a body approves only the language contained in House and Senate bills. By eschewing reliance on the unenacted intentions voiced by various individuals or subgroups within both chambers, textualists maintain that they are

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[94] *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 313–54 (1986); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

[95] *See, e.g.*, HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF THE LAW 1111–383 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); Richard Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817–22 (1983).

[96] *See, e.g.*, W. Va. Univ. Hosps. v. Casey, 499 U.S. 83 (1991) (Scalia's majority opinion relies on textualism, while Stevens' dissent relies on intentionalism); Green v. Bock Laundry Mach. Co., 490 U.S. 504 (1989) (Stevens' majority opinion relies on intentionalism, while Scalia's concurrence relies on textualism); United Steelworkers v. Weber, 443 U.S. 193 (1979) (Brennan's majority opinion and Rehnquist's dissent rely heavily on intentionalism, while Blackmun's concurrence relies on a dynamic interpretive approach).

[97] On the current Supreme Court, Justices Scalia and Thomas are known for embracing textualism while Justices Stevens and Breyer are generally advocates of intentionalism. Federal judges are reluctant to endorse openly the dynamic interpretation approach, presumably because they are uncomfortable playing such an explicitly creative role in the arena of statutory construction. *But cf. Weber*, 443 U.S. at 209 (Blackmun, J., concurring) (invoking "considerations, practical and equitable, only partially perceived, if perceived at all, by the 88th Congress," to justify support for voluntary affirmative action plans under Title VII).

being properly respectful of Congress's lawmaking supremacy.[98] Such deference to the legislative text is most likely to occur when a statute's meaning is relatively clear—to both the affected public and the courts. In that setting, textualists argue persuasively that their approach fosters an optimal measure of judicial dependence.

As suggested earlier, however, statutory language as a form of communication is not always this clear. When interpretative discretion and judgment are required to decipher inconclusive terms, phrases, or provisions, textualists in effect advocate that judges act as sophisticated linguistic technicians.[99] In parsing the words of the statute and applying language-related rules and conventions, textualists dismiss the legislative process as a resource to help resolve uncertain statutory meaning. That dismissiveness seems to extend the scope of judicial independence in two respects. First, it excludes potentially probative evidence generated by the legislative branch, provided one accepts that Congress as an institution tends to act purposively and that legislation is likely to reflect the majority's preferences and sentiments much of the time.[100] In addition, by relying on the essentially apolitical logic of linguistic analysis, textualists in effect declare their indifference to the policy-related consequences of their interpretive decisions.[101] Given that Congress enacts laws in order to create policy-related consequences, this level of indifference signifies a further expression of judicial independence from the legislative branch.

Textualists often respond by pointing to the even more independent alternatives, contending that courts charged with explicating inconclusive language should prefer interpretive tools that are less susceptible to misunderstanding or misuse in the hands of naive or result-oriented judges. Principled application of such relatively benign

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[98] *See, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421, 452–53 (1987) (Scalia, J., concurring); Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 376 (1987). *See generally* WILLIAM D. POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION 157–58 (1999).

[99] *See generally* Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 371–73 (1994); George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321, 341–46 (1995).

[100] There is a good deal of scholarship questioning whether it is possible to discern a "purpose" to congressional enactments. *See generally* Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 426–29, 438–45 (1988); John F. Manning, *Legal Realism and the Canons' Revival*, 5 GREEN BAG 2D 283, 289–91 (2002). I have joined that debate on other occasions, and will not re-enter here. *See generally* James J. Brudney, *Congressional Commentary on Judicial Interpretation of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 47–56 (1994). I rely, however, on what remains a dominant, if not prevailing, view that the legislative process possesses a baseline measure of coherence, *i.e.*, that legislators who agree a certain text should become law are generally able to achieve a broadly shared understanding of the purpose(s) that triggered enactment and often a similar understanding as to the meaning and implications of certain specific provisions. *See generally* Posner, *supra* note 42, at 195–96; Cass R. Sunstein, *Must Formalism be Defended Empirically?*, 66 U. CHI. L. REV. 636, 649 (1999).

[101] *See generally* Easterbrook, *supra* note 93, at 547–52.

tools, the argument continues, will confine judges more effectively to the legislative substance that Congress enacted.[102] Yet, assuming arguendo the desirability of contextual approaches that are less likely to be misunderstood or misused by the average federal judge, the choice between historical and linguistic context is not a clear one.

Legislative history can at times be unreliable as an aid to understanding ambiguous text. Its conditions of production—featuring more secrecy and less accountability than the production of text—allow for the possibility of strategic behavior by legislative staff and lobbyists.[103] Moreover, the proliferation of legislative history materials enables judges to rely on certain parts of the legislative record and ignore others in ways that may seem incoherent or manipulative.[104]

Linguistic context, however, offers analogous potential for judicial misunderstanding and misuse. Dictionaries regularly contain multiple definitions for a word, and priority of usage may vary from one dictionary to another or from one historic period to another.[105] Similarly, canons of construction tend to be framed as presumptions about the way language or some extrinsic source of authority should

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[102] *See, e.g.*, Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 63 (1994) (emphasizing that "political society wishes to . . . confine judges" and that "[h]aving a wide field to play—not only the statute but also the debates, not only the rules but also the values they advance . . .—liberates judges. This is objectionable on grounds of . . . predictability."); *see also* Richard J. Lazarus & Claudia M. Newman, City of Chicago v. Environmental Defense Fund: *Searching for Plain Meaning in Unambiguous Ambiguity*, 4 N.Y.U. ENVTL. L.J. 1, 23 (1995) (suggesting that the textualist approach may inure to the benefit of environmental groups because "[t]he literal language of most environmental statutes tends to be extraordinarily aspirational and unforgiving in its application").

[103] *See, e.g.*, Starr, *supra* note 98, at 376–77; Blanchard v. Bergeron, 489 U.S. 87, 98–99 (1989) (Scalia, J., concurring).

[104] Judge Leventhal lampooned this tendency by referring to legislative history as a way of "looking over a crowd and picking out your friends," *quoted in* Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983). *See also Statutory Interpretation and the Uses of Legislative History: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong. 21–22 (1990) [hereinafter *Stat. Interp. Hrg.*] (statement of Judge James L. Buckley) (arguing that "[j]udges confined to the printed page and occupying a world far removed from the pressure cooker life on Capitol Hill," cannot readily distinguish between statements genuinely intended to enlighten or persuade colleagues and those motivated by a desire to manipulate courts).

[105] *See* Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 BUFF. L. REV. 227, 264–83 (1999) (criticizing the Court's inconsistent and at times incoherent reliance on dictionaries); Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1444–49 (1994) (same). In addition, courts at times decide to reject dictionary meaning and rely instead on the common understanding of key statutory terms. *See, e.g.*, Nix v. Hedden, 149 U.S. 304, 307 (1893) (concluding that tomatoes are "vegetables" and not "fruit" in tariff context).

apply, subject to conditions or caveats that may neutralize the presumptions.[106] This contingent design has led to canons being famously paired with "counter canons," suggesting that judges have considerable freedom as to the canonical direction they will follow in a particular case.[107] Given the indeterminate aspects of dictionaries and canons, it is hardly surprising that these language-related techniques have often been applied in an almost adversarial manner by federal judges.[108]

In short, both historical and linguistic context are anecdotally unreliable as guidance to the meaning of enacted texts, but there is no reason to view one set of resources as more systematically unreliable than the other. Judge Richard Posner, writing with characteristic understatement on this issue, has suggested that when federal judges invoke a contextual resource to help explain inconclusive text, "the irresponsible judge will twist any approach to yield the outcomes that he desires, and the stupid judge will do the same thing unconsciously."[109]

Apart from such unresolved considerations of reliability, a federal judge seems more removed from the authority of the legislative branch when she addresses textual ambiguities solely by reference to the dictionary or the canons of construction while ignoring statements from key members of Congress on which legislative colleagues may well have relied when casting their votes.[110] The explanations offered in committee reports or in bill managers' floor statements derive in constitutional terms from Congress's own policymaking authority,[111] and those explanations often contribute meaningfully to members' understanding of statutory text.[112] There is less

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[106] *See* Eskridge, *supra* note 92, at 679.

[107] *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395, 401–06 (1950).

[108] For relatively recent examples at the Supreme Court level, see *Muscarello v. United States*, 524 U.S. 125, 127–34, 139–40 (1998) (Justice Breyer duels with Justice Ginsburg on the dictionary definition of the verb "carry"); *Reves v. Ernst & Young*, 507 U.S. 170, 177–78 (1993) (Justice Blackmun disagrees with Justice Souter over the dictionary definition of the verb "conduct"); *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon.*, 515 U.S. 687, 700–08, 715–25 (1995) (Justice Stevens' reliance on Whole Act Rule clashes with Justice Scalia's emphasis on *noscitur a sociis*).

[109] RICHARD POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 287 (1985).

[110] *See* McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 738 (1992); Abner J. Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380, 385–86.

[111] *See* U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings. . . ."); U.S. CONST. art. I, § 5, cl. 3 ("Each House shall keep a Journal of its Proceedings, and from time to time publish the same. . . .").

[112] *See, e.g.*, Abner J. Mikva, *Reading and Writing Statutes*, 48 U. PITT. L. REV. 627, 631 (1987) (former Congressman and D.C. Circuit Judge referring to committee report as the "bone structure of the legislation . . . the road map that explains why things are in and things are out of the statute"); Joan Biskupic, *Scalia Takes a Narrow View in Seeking Congress' Will*, 48 CONG. Q. 913, 917 (1990) (relating Senator Specter's view that "members of Congress are more likely to

reason to believe that Congress relies on, or is even aware of, formal linguistic sources such as the canons or the dictionary unless Congress demonstrates this awareness in legislative history.[113] Accordingly, invoking such sources to the exclusion of the legislative record remains a statement of relative judicial autonomy.

We have already noted the importance of acknowledging the extent to which judges are far more than impersonal implementers of legal rules and precedents. Different judicial backgrounds, experiences, and values contribute—often subconsciously but at times predictably—to the rule-of-law applications that shape doctrinal development. It is also worth considering whether different analytic approaches have a predictable influence on the substantive direction of the law. Specifically, might reliance on certain types of contextual sources to discern statutory meaning alter our view of judges as relatively subsidiary actors in this arena, thereby affecting our understanding as to the balance of powers between federal courts and Congress?[114]

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read a committee report than the bill itself. The prose of a report is easier to understand, and, because a bill usually amends an existing statute, it is impossible to follow without referring to the U.S. Code."); *Stat. Interp. Hrg.*, *supra* note 104, at 21 (statement of Judge James L. Buckley) ("[M]y understanding of most of the legislation I voted on [while a U.S. Senator] was based entirely on my reading of its language and, where necessary, on explanations contained in the [committee] report."). *See generally* Bank One Chi., N.A. v. Midwest Bank & Trust Co., 516 U.S. 264, 276 (1996) (Stevens, J., concurring) (observing that "[l]egislators, like other busy people, often depend on the judgment of trusted colleagues when discharging their official responsibilities" and that "if a statute . . . has bipartisan support and has been carefully considered by committees familiar with the subject matter, Representatives and Senators may appropriately rely on the views of the committee members in casting their votes").

[113] Reliance on the judicially constructed canons is especially problematic because it is not clear that Congress, with its steadily declining proportion of lawyer-members, has any serious awareness of their existence, much less their specific applicability. *See* NORMAN J. ORNSTEIN ET AL., VITAL STATISTICS ON CONGRESS, 1999–2000, at 20–21, 26–27 (2000) (reporting that number of senators who are trained as lawyers has decreased from 68 in 1967 to 55 in 1999, and number of representatives who are lawyers has declined from 246 in 1967 to 163 in 1999). Judge Mikva suggested, with a trace of sarcasm, that during his extended tenure in the House, the "only 'canons' we talked about were the ones the Pentagon bought that could not shoot straight." Mikva, *supra* note 112, at 629.

[114] One admittedly laborious way of examining this empirical problem is to classify and analyze judicial reasoning in a particular area of substantive law over an extended period of time. In that regard, I am currently compiling a data base of the more than six hundred labor and employment law cases decided by the Supreme Court during the Burger and Rehnquist Court eras. By coding outcomes in relation to the different statutory schemes or constitutional provisions involved, as well as the judicial reasoning relied on in each opinion, I hope to be able to discuss the extent to which certain sources of interpretation—such as dictionaries, linguistic and substantive canons, legislative history, Supreme Court precedent, and agency deference—are more heavily used than others, or are more outcome-related in this area of law when used by certain justices or during certain time periods.

In that regard, research addressing the recent record of relations between Congress and the Supreme Court on statutory interpretation decisions yields some intriguing results. The Court since the early 1980s has placed greater reliance on dictionary definitions[115] and the canons of construction,[116] and less reliance on legislative history,[117] when interpreting statutes. A number of these textualist decisions triggered sharp responses from a liberal Congress influenced or controlled by the Democratic Party. Many well-publicized overrides of statutory interpretation rulings in the 1980s and early 1990s reversed decisions in which the Court had relied on plain meaning or on the canons of construction.[118] Congressional frustration over the Court's approach is further suggested by the higher percentage of overrides in this

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[115] *See* David O. Stewart, *By the Book: Looking Up the Law in the Dictionary*, A.B.A. J., July 1993, at 46, 46–47 (reporting that justices recited dictionary definitions of key phrases fifty-four times in thirty-eight cases between Jan. 1, 1992 and May 17, 1993, compared to only four cases in 1951 and 1952); Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Remains a Fortress: An Update*, 5 GREEN BAG 2d 51, 51–52 (2001) (reporting that the Court in the 1990s cited to dictionaries in over two hundred opinions, nearly half the total number of opinions referring to dictionaries in Supreme Court history).

[116] *See generally Stat. Interp. Hrg.*, *supra* note 104, at 83 (statement of Prof. William N. Eskridge, Jr.); Joseph Henry Bates, *Symposium Introduction: A Reevaluation of the Canons of Statutory Interpretation*, 45 VAND. L. REV. 529, 530 (1992); Manning, *supra* note 100, at 289.

[117] *See* Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV. J. ON LEGIS. 369, 384–95 (1999) (reporting decline in use of legislative history in Supreme Court opinions since 1980, especially opinions authored by more conservative justices); Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205, 212–20 (reporting decline from 1987 to 1994); Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988–89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277 (1990) (reporting decline during the 1980s).

[118] *See, e.g.*, W. Va. Univ. Hosps. v. Casey, 499 U.S. 83 (1991), *overridden by* Civil Rights Act of 1991, Pub. L. No. 102-166, § 113, 105 Stat. 1071, 1079 (1991); Pub. Employees Ret. Sys. of Ohio v. Betts, 492 U.S. 158 (1989), *overridden by* Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (1990); Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985), *overridden by* Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100 Stat. 1807, 1845 (1986); Smith v. Robinson, 468 U.S. 992 (1984), *overridden by* Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796 (1986). *See generally* Daniel J. Bussel, *Textualism's Failures: A Study of Overruled Bankruptcy Decisions*, 53 VAND. L. REV. 887, 903–10 (2000) (finding that textualist decisions construing federal bankruptcy code are more likely to be overridden than other bankruptcy decisions in period from 1978 to 1998); Eskridge, *supra* note 35, at 347–48 (concluding that Congress is more likely to override "plain meaning" decisions than any others, since nearly half of the overrides since 1967 address decisions in which the primary reasoning was plain-meaning or canons-of-construction reasoning, whereas overrides of decisions based on statutory "purpose" are rare); Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMP. L. REV. 425, 448 (1992) (noting that a disproportionate number of decisions between 1968 and 1988 that were overridden by Congress relied on a "plain meaning" analysis).

period that occurred within a short time following the Court's decision.[119] It is broadly consistent with this pattern of interactions that the Republican-controlled Congresses in place since January 1995 appear less interested in pursuing overrides of the Supreme Court's statutory interpretation decisions than were their liberal Democratic predecessors.[120]

Various commentators and dissenting Justices have suggested that the Court's textualist approach seems inclined to thwart the will of Congress.[121] One vivid, recent example involves the decision in *Circuit City Stores, Inc. v. Adams*.[122] The Court in *Adams* held that the Federal Arbitration Act's basic coverage provision—making enforceable any arbitration clause addressed to a transaction "involving commerce"—applied to the full extent of Congress's commerce clause powers, but that the Act's exemption for employment contracts affecting seamen, railroad employees, or "any other class of workers engaged in foreign or interstate commerce" excluded only workers in the transportation industries.[123] In Justice Kennedy's majority opinion, the

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[119] *See* H.R. Rep. No. 102-40 pt. 1, at 23–81 (1991) (discussing ten Supreme Court decisions specifically targeted for override or modification by 1991 Civil Rights Act; seven of the ten had been decided between 1989 and 1991); Eskridge, *supra* note 35, at 450–55 (reporting data on overrides that indicate 62% of statutory overrides between 1987 and 1990 occurred within two years of the Court's decision, whereas 44% of overrides between 1982 and 1986, and 32% of overrides between 1967 and 1981, were within two years of the Court's decision).

[120] My research assistant and I sought to follow Professor Eskridge's principal method of tracking override legislation by relying on committee report discussion contained in *U.S. Code Congressional and Administrative News* (U.S.C.C.A.N.). *See* Eskridge, *supra* note 35, at 336–37 (discussing data collection). In the last three Congresses that Eskridge examined (99th through 101st, 1985–1990), Congress passed 64 override statutes (21.3 per Congress), overriding a total of 39 Supreme Court decisions (13 per Congress) and 72 lower court decisions (twenty-four per Congress). *Id.* at 338. During the first two Congresses most recently under Republican control (104th and 105th, 1995–1998), Congress passed 14 override statutes (7 per Congress), overriding a total of 7 Supreme Court decisions (3.5 per Congress) and 23 lower court decisions (11.5 per Congress). Even allowing for a decrease in the overall number of laws passed in the two later Congresses (and also the risk that exclusive reliance on U.S.C.C.A.N. may modestly understate the number of override statutes), this contrast is striking. (Results for the 104th and 105th Congresses are on file with author).

[121] *See, e.g.*, Steven R. Greenberger, *Civil Rights and the Politics of Statutory Interpretation*, 62 U. COLO. L. REV. 37 (1991); Wendy E. Parmet, *Plain Meaning and Mitigating Measures: Judicial Interpretations of the Meaning of Disability*, 21 BERKELEY J. EMP. & LAB. L. 53 (2000); Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Res., 532 U.S. 598, 622–23 (2001) (Ginsburg, J., dissenting). *See generally Casey*, 499 U.S. at 115 (Stevens, J., dissenting) ("[W]e do the country a disservice when we needlessly ignore persuasive evidence of Congress' actual purpose and require it 'to take the time to revisit the matter' and to restate its purpose in more precise English whenever its work product suffers from an omission or inadvertent error.") (quoting Smith v. Robinson, 468 U.S. 992, 1031 (1984) (Brennan, J., dissenting)).

[122] 532 U.S. 105 (2001).

[123] *Id.* at 113–18.

difference between the capacious meaning of "involving commerce" and the confined meaning of "engaged in commerce" was deemed so self-evident that it was improper even to consult the legislative record concerning the genesis of those two phrases.[124] The dissent's reliance on legislative history to show that the enacting Congress intended the exact opposite of what the Court accomplished[125] was brushed aside as simply irrelevant to the Court's interpretive function.

The tension between a liberal Congress that manifests certain socially redistributive purposes and a conservative federal judiciary that disregards such purposes (and rejects the legislative record's evidence thereof) has distinctly historical overtones reaching back to the New Deal, if not beyond.[126] Contemporary judicial suspicion regarding the relevance of legislative intent or purpose is often accompanied by skeptical attitudes toward the values of the modern regulatory state.[127] Such attitudes in turn may reflect the courts' reluctance to concede that presumptions favoring private markets and private rights are not appropriate background norms for the interpretation of regulatory statutes.[128]

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[124] *Id.* at 119.

[125] *See id.* at 125–29 (Stevens, J., dissenting) (relying on "extensive and well documented" legislative history to demonstrate that Congress plainly intended to exclude FAA application to contracts of employment, in direct response to organized labor's concerns, while the majority opinion endorses a policy that strongly favors private arbitration of these very same employment disputes).

[126] *See* Frederick J. de Sloovere, *Extrinsic Aids in the Interpretation of Statutes*, 88 U. PA. L. REV. 527, 539 (1940):

> If a statute means only what a court . . . wishes to think it means . . . , and if searching for immediate legislative objectives in the internal history of the legislation and in conditions surrounding its enactment is a misguided effort, then language techniques and juristic conceptions become the sole bases for statutory interpretation of the future, and we find ourselves back where we were a century ago in the judicial handling of legislation.

See also James M. Landis, *A Note on "Statutory Interpretation"*, 43 HARV. L. REV. 886, 889–91 (1930) (suggesting that "[w]hen the intent or meaning of the legislature is discoverable [from the legislative record], statutory interpretation posits no serious problem except the political one of insistence upon judicial humility," and that "[t]he real difficulty is twofold: that strong judges prefer to override the intent of the legislature in order to make law according to their own views, and that barbaric rules of interpretation too often exclude the opportunity to get at legislative meaning in realistic fashion"). *See generally* William N. Eskridge, Jr., *Legislative History Values*, 66 CHI.-KENT L. REV. 365, 392–93 (1990) (noting that legislative history as evidence of statutory purpose became a dominant theme after 1938).

[127] *See, e.g.*, Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 15–19 (1984) (emphasizing extent to which many modern laws are designed to serve private rather than public interests). *See generally* CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 6 (1990).

[128] *See* SUNSTEIN, *supra* note 127, at 140–42.

There is, however, nothing inevitably conservative about judicial reliance on "language techniques"[129] or judicial refusal to consider legislative history and purposes. Confronted with the task of interpreting laws enacted by a politically conservative legislature, a textualist court could use such language techniques to vindicate liberal ideological positions. That, in fact, is what appears to have occurred in a number of South African appellate court decisions during the late 1980s, narrowly construing emergency legislation enacted by the apartheid government.

Professor Stephen Ellmann has described in detail judicial responses to various internal security and public safety laws enacted to restrict civil rights and civil liberties in South Africa.[130] In a parliamentary regime that had no written constitution, South African appellate courts lacked the power to invalidate duly promulgated national statutes,[131] and their general tendency was, perhaps not surprisingly, to vindicate the government's broad domestic security powers against claims brought by aggrieved individuals.[132] In several instances, however, these appellate judges relied on "ordinary meaning," canons of construction, and other text-related interpretive conventions to limit the intrusive nature and obviously restrictive intent of the South African laws.[133] By focusing on the language and structure of key statutory provisions, the appellate court was able to overcome likely legislative purposes and provide a measure of protection for individuals whose liberty and personal safety had been compromised. Ellmann goes on to advocate reliance on such language-related techniques as instruments of judicial control over statutory meaning, instruments that

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[129] de Sloovere, *supra* note 126, at 539.

[130] *See generally* STEPHEN ELLMANN, IN A TIME OF TROUBLE: LAW AND LIBERTY IN SOUTH AFRICA'S STATE OF EMERGENCY (1992).

[131] *See* LOURENS M DU PLESSIS & AG DU PLESSIS, AN INTRODUCTION TO LAW 73–74 (2d ed. 1995) (discussing South African judiciary's subservient role during decades of apartheid government).

[132] *See* ELLMANN, *supra* note 130, at 64–71 (discussing Appellate Division's pattern of decisions upholding government exercise of emergency powers in the 1980s); Lynn Berat, *Courting Justice: A Call for Judicial Activism in a Transformed South Africa*, 37 ST. LOUIS U. L.J. 849, 850–51, 858–61 (1993) (criticizing Appellate Division's capitulation to rationale of parliamentary supremacy from the late 1950s to the early 1990s).

[133] *See, e.g.*, Minister of Law & Order v. Mathebe, 1990 (1) SA 114, 116–23 (A) (relying on close textual analysis and canons to invalidate two arrests that conflicted with the presumption against exercise of extraterritorial powers by the arresting police force); Nkwentsha v. Minister of Law & Order, 1988 (3) SA 99, 111–17 (AD) (relying on ordinary meaning analysis to hold that a detainee could be brought to court to testify); Minister of Law & Order v. Hurley, 1986 (3) SA 568, 577–90 (AD) (relying on plain language analysis and clear statement canon to reject government's argument that the court lacked jurisdiction to determine whether a person was lawfully arrested and detained pursuant to 1982 Internal Security Act, and to conclude that the person here was not properly detained). *See generally* ELLMANN, *supra* note 130, at 50–54, 118–28, 142–52 (describing Appellate Division's interpretive innovations in support of human rights in these and other decisions).

may be used to protect fundamental human rights in a repressive parliamentary regime.[134]

In short, while textualism is inherently neither conservative nor liberal, it may well foster a propensity to temper and even frustrate legislative expectations. Exclusive reliance on linguistic context enables a court to discount evidence of any shared purposes or understandings among the legislators who voted for the statute. That level of judicial autonomy in statutory interpretation may be something we choose to value in some circumstances. Demanding that Congress draft laws clearly may at times yield less ambiguous and more broadly understandable texts,[135] especially if one presumes a certain level of efficient competence in legislative lawmaking and a certain attentive responsiveness to judicial pronouncements.[136] Inviting the judiciary to ignore legislative intent may also allow courts to protect individual rights regarded as fundamental, particularly in a regime that lacks a written constitution or other form of "higher" law capable of trumping statutory authority. If, however, we prefer to promote these values by encouraging greater judicial independence as part of the statutory interpretation process, we would do well to acknowledge that preference and refine our current notion of federal courts as dependent actors in the legislative arena.

C. *Dynamic Interpretation and Updating of Legislative Purpose*

Dynamic interpretation can also be viewed as furthering a dependent judicial role, though in a somewhat less linear fashion than textualism. Proponents of the dynamic approach observe that Congress as an institution does not expect the meaning of its legislative products to be rigidly confined by the understandings or circumstances surrounding their initial enactments. Often, text is not sufficiently clear or specific, and original legislative assumptions have been overtaken by subsequent political, economic, and legal developments. In these circumstances, courts should seek to further the "meta-intent" of making federal statutes effective over time by

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[134] *See id.* at 47–53, 233, 238–39 (describing courts' ability to rely on the canon that statutes are presumed not to alter the common law, which at the time was more protective of human rights than many South African statutes).

[135] *See generally* United States v. Taylor, 487 U.S. 326, 344–46 (1988) (Scalia, J., concurring).

[136] *See* Sunstein, *supra* note 100, at 658–59 (suggesting that the formalist interpretive approach emphasizing plain meaning works well in the U.K., where Parliament is highly professionalized and responsive to judicial identification of "mistakes"). It has been pointed out that the American system does not compare favorably in terms of either professionalization or responsiveness to mistakes. *See generally* P.S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 104–12, 306–23 (1987).

construing them to integrate most effectively with the contemporary legal and social landscape.[137]

This dynamic or forward-looking approach, the argument continues, renders the courts appropriately dependent in that judges effectively defer to more recent perspectives on statutory meaning adopted by the two democratically elected branches. If, for instance, the executive branch agency primarily responsible for statutory enforcement acts to readjust original legislative priorities so as to incorporate new commercial or technological realities of the regulated marketplace, federal courts may ratify this updating process by deferring to present expressions of administrative expertise.[138] Even if the Executive Branch is not involved, judicial updating roughly tracks the political preferences of the contemporary Congress because that group of legislators can be presumed to support the priorities and policies reflected in federally adjudicated law.[139] To the extent that federal courts misapprehend those priorities or policies, Congress is in a position to respond with corrective overrides.

Although this type of current preferences "default" formally respects the principles of democratic accountability, dynamic interpretation also elevates courts as the primary exponents of such current understandings in the legal culture. By relying on evolving political values and unanticipated social or economic changes, courts will, at times, generate applications of a statute that depart dramatically from what the enacting legislature would have contemplated or intended. The relatively open-ended nature of this judicial updating gives rise to some concern regarding consistency and objectivity in the application of statutes. More important for our purposes, reliance on post-enactment changes in societal priorities or ideological directions can foster judicial autonomy in two important respects.

First, post-enactment interpretive rulings often do not reinforce, or even comport with, the purposes or policies embodied in the statute being interpreted. Courts functioning "dynamically" will be inclined to elevate their own policy preferences at the expense of Congress's previously enacted value structure. This is not simply because dynamic interpreters prefer present values to those of the past. Courts themselves are key arbiters and shapers of such present values in our legal culture, as articulated through their recent constitutional interpretations and also through judicial

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[137] *See generally* DWORKIN, *supra* note 94, at 313–14, 337–38, 348–50; Eskridge, *supra* note 94, at 1482–84; Donald C. Langevoort, *Statutory Obsolescence and the Judicial Process: The Revisionist Role of the Courts in Federal Banking Regulation*, 85 MICH. L. REV. 672, 729–32 (1987).

[138] *See id.* at 687–718 (describing the Court's reliance on agency innovations as part of its decisions updating 1933 Glass-Steagall Act in a way that ended separation of commercial and investment banking); *see also* Smiley v. Citibank (S.D.), 517 U.S. 735, 735–42 (1996) (upholding deference to new agency interpretation that is inconsistent with prior agency positions, reasoning in part that "[such] change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency").

[139] *See generally* Eskridge, *supra* note 94, at 1527.

decisions that endorse newer ideological norms or that embrace the policy values of separate statutory directives. Because the courts themselves are often primarily responsible for inaugurating these "evolving" values and priorities, an approach that emphasizes the legitimacy of their role will subtly tilt the present meaning of statutes toward policy preferences embraced by the judiciary.

To take just one example, the Supreme Court since the early 1960s has created a robust First Amendment protection against government-compelled speech or association.[140] In the labor relations setting, Congress had previously authorized agency shop arrangements to address various problems associated with free ridership.[141] The Court's decisions constitutionalizing individual employees' right to refrain initially created some tension with Congress's evident purpose of allowing democratically chosen unions to expend agency fees outside the collective bargaining context in order to improve their members' working conditions.[142]

Over the past twenty-five years, however, the Court—relying explicitly or implicitly on the canon of avoiding constitutional questions—has creatively construed federal labor law statutes so as to strengthen private employees' rights to refrain from supporting union activities.[143] The Court's federal statutory decisions, along with

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[140] *See, e.g.*, Keller v. State Bar of Cal., 496 U.S. 1, 9–17 (1990) (upholding attorneys' right to refrain from certain messages promulgated, or activities engaged in, by the state bar); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 232–37 (1977) (upholding employee's right to refrain from participation in certain union activities or messages); Wooley v. Maynard, 430 U.S. 705, 714–17 (1977) (upholding individual's right to refrain from displaying state motto on a license plate). The Supreme Court initially articulated a First Amendment right to refrain in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 635–42 (1943), which involved a religiously-based refusal to salute the flag; the Court gave the theory more general application in the 1960s and 1970s. *See generally* Victor Brudney, *Association, Advocacy, and the First Amendment*, 4 WM. & MARY BILL RTS. J. 1 (1995) (examining individual's right to refrain from advocacy activities engaged in by large associations).

[141] *See* 45 U.S.C. § 152 (1994) (Railway Labor Act); 29 U.S.C. § 158(a)(3) (1994) (NLRA). *See generally* Ry. Employees' Dept. v. Hanson, 351 U.S. 225, 233–38 (1956); *see also* United States v. C.I.O., 335 U.S. 106, 120–24 (1948) (holding that Congress in the 1947 Taft-Hartley Act did not prohibit unions from publishing periodicals or pamphlets that urged members to support particular political candidates).

[142] *See* Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 812–18 (1961) (Frankfurter & Harlan, J.J., dissenting) (documenting organized labor's longstanding practice of making expenditures on broad range of issues with aim of preserving or promoting unions' role as effective bargaining agents).

[143] *See, e.g.*, Ellis v. Bhd. of Ry. Clerks, 466 U.S. 435, 444–48 (1984) (reframing First Amendment challenge to certain union expenditures brought by objecting feepayers as a challenge based on judicially articulated standard governing expenditures chargeable under Railway Labor Act (RLA), and then vindicating feepayers' statutory challenge in important respects); Communications Workers v. Beck, 487 U.S. 735, 754 (1988) (construing National Labor Relations Act (NLRA) to protect individual employees' rights of non-association by relying on its own RLA precedents as controlling).

companion cases construing state collective bargaining statutes, have impaired unions' ability to expend funds on activities away from the bargaining table, even when those activities plainly advance the economic interests of the individuals the unions represent.[144] These restrictions derive their persuasive force from the Court's evolving First Amendment-related concerns, rather than from fidelity to Congress's understanding when it enacted agency shop arrangements in the 1940s and 1950s.[145]

The Court's constitutional solicitude for individual objectors also influenced its 1985 decision in a related statutory area, limiting unions' ability to maintain internal discipline while engaged in concerted activity. In *Pattern Makers' League of North America v. NLRB*,[146] the Court held that a union may not fine its own members when they resign during a strike in violation of the union constitution. The decision represented a break with authority from prior decades, authority predicated in part on a labor law proviso that allows unions to prescribe their own membership rules.[147] Earlier Court decisions in this area emphasized the importance of the union's ability, during a strike, "to protect against erosion [of] its status . . . through reasonable [internal] discipline. . . ."[148] By contrast, Justice Powell in *Pattern Makers'* focused on the statute's "implicit" policy of voluntary unionism,[149] and reasoned that this policy foreclosed any restrictions on employees' rights to resign from the union. This

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[144] *See, e.g., Ellis*, 466 U.S. at 451–53 (holding that objecting bargaining unit members may not be charged for union expenditures to organize additional employees, even if employees are doing the same work for the same employer in another location); *id.* at 453 (holding that objecting bargaining unit members may not be charged for union expenditures to support litigation arising outside the bargaining unit, even if the issue being litigated applies directly to objectors' bargaining unit or uniformly to all of the employer's bargaining units); Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 519–22 (1991) (in a public employment context, holding that objecting bargaining unit members may not be charged for union lobbying that improves the terms and conditions of employment outside the collective bargaining setting).

[145] *See, e.g.*, Norman L. Cantor, *Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association*, 36 RUTGERS L. REV. 3, 7–14, 40–46 (1983) (describing Supreme Court decisions as, in effect, overriding the congressional intent that unions be able to collect fees to support a broad range of representational services, including services performed outside the collective bargaining arena); Reuel E. Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength*, 20 BERKELEY J. EMP. & LAB. L. 1, 29, 41–46, 64–69 (1999) (discussing Court's shift away from pluralist-inspired protection for free speech rights of unions to engage in politics and toward emphasis on free speech rights of individuals objecting to their union's activities).

[146] 473 U.S. 95, 104–14 (1985).

[147] *See* 29 U.S.C. § 158(b)(1)(A) (1994) (prohibiting union restraint or coercion of employees in the exercise of their § 157 rights: "Provided [t]hat this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.").

[148] *See* NLRB v. Boeing, 412 U.S. 67, 72–73 (1973); NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180–83 (1967).

[149] *Pattern Makers'*, 473 U.S. at 104–05.

readjustment of congressional policy values seems related to, if not derived from, the Court's concomitant interest in individual employees' freedom to avoid associating with the unions that represent them.[150] Even assuming these various developments in statutory policy are regarded as salutary in normative terms, they are best understood as reflecting priorities of the contemporary judiciary rather than the enacting Congress.

A second way in which dynamic interpretation encourages judicial independence is in its requirement that the current Congress assemble an enacting coalition in order to revisit the courts' "updating" interpretations. As has already been noted, this legislative correction process is fraught with difficulty. Statutory overrides are inhibited by lack of time and resources, both for monitoring effectively the vast array of judicial decisions and for securing the coalition support and agenda access to overturn decisions that are deemed objectionable.[151]

Such challenges can hardly be described as unanticipated. The federal legislative process was designed as a kind of obstacle race, featuring delegation to committees, rules that limit the agenda for floor action, and requirements of bicameralism and presentment. These constitutional and practical constraints present substantial impediments to the enactment of new laws, especially laws that modify contentious regulatory schemes. One corollary is that the older regulatory statutes tend to survive largely intact despite the erosion of the political coalitions and popular intensity that initially produced them. Their vitality may be overcome in the congressional arena only if a new political coalition or wave of public commitment is powerful and sustained enough to prevail over institutional gridlock or inertia. Yet, by privileging the "updated" perspectives of the federal judiciary, the dynamic approach invites courts to alter—at times fundamentally—the meaning of regulatory schemes that have not been expanded, diluted, or even specifically addressed by subsequent congressional action.

As was the case with textualism, we may at times wish to promote a more autonomous judicial role under the rubric of dynamic interpretation. In the case of older "common law"-type statutes that create a cause of action but little else, or that rely on majestic generalities accompanied by spare regulatory specifics, it may be prudent to encourage the evolution of legislative meaning through accretions of judicial lawmaking.[152] That is how courts typically answer questions raised in comparably open or unconstrained areas of common law or constitutional law. There

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[150] *See id.* at 106 n.16 (relying on *Ellis* to argue that membership in a union has been reduced to a "financial core" of fee-paying, and this core does not include susceptibility to union discipline for resigning from "full member" status).

[151] *See supra* note 37 and accompanying text.

[152] *See, e.g.*, City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 259, 266–70 (1981) (applying considerations of current public policy to explicate meaning of 42 U.S.C. § 1983); Smith v. Wade, 461 U.S. 30, 46–50 (1983) (same); *id.* at 93–94 (O'Connor, J., dissenting) (same). *See generally* Eskridge, *supra* note 94, at 1486–88.

also may be instances in which regulatory statutes are in some tension with one another, and courts can play a constructive role by coordinating such overlapping objectives or competing requirements.[153]

Still, it seems worth asking whether courts more generally are well suited to the task of modifying the detailed and reticulated regulatory structures created by Congress. Given the systemic "landscape altering" that the enacting legislature meant to achieve in such instances, one might hesitate before concluding that subsequent changes wholly outside the ambit of a given regulatory scheme should subject that scheme to piecemeal tampering by the judiciary. And once again, assuming one supports the value of a dynamic approach at least in some instances, it is useful to recognize the ways in which such support tends to vindicate a more independent role for federal judges when interpreting statutes.

D. *Intentionalism and Devotion to Legislative Purpose*

An intentionalist approach to the meaning of federal statutes is more likely than its interpretive "competitors" to further the relatively dependent judicial role initially identified as desirable from a separation of powers standpoint. In an era when comprehensive regulatory statutes have supplanted judge-made common law as the primary source of public or societal consensus,[154] the courts' efforts to discern and apply particular legislative intent, or to extrapolate from original legislative purpose,[155] have been characterized as essentially that of junior partner in the lawmaking enterprise.[156] Assuming that evidence of such intent or purpose can be

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[153] *See, e.g.*, J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc., 534 U.S. 124, 130–46 (2001) (giving distinct effect to two overlapping patent statutes); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 27–29 (1991) (elevating Congress's general policy supporting arbitration over its more specifically stated policy favoring judicial access to vindicate federal civil rights protections); United States v. Batchelder, 442 U.S. 114, 123–25 (1979) (reconciling two overlapping criminal law provisions by relying in part on the policy of respect for prosecutorial discretion).

[154] *See generally* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); POPKIN, *supra* note 98, at 131.

[155] It is not necessary to distinguish here between "hard" intentionalism, seeking to discover how the enacting Congress actually intended the interpretive matter to be resolved (or would have intended it to be resolved had the issue been raised during pre-enactment deliberation), and "softer" intentionalism, drawing on the original purposes of the legislation as a surrogate to determine which interpretation best comports with those purposes. *See* Eskridge, *supra* note 94, at 1479–80.

[156] *See, e.g.*, HART & SACKS, *supra* note 95, at 1374 (discussing the courts' approach to statutory interpretation based on "[r]espect [for] the position of the legislature as the chief policy-determining agency of the society"); Posner, *supra* note 100, at 189–90 (analogizing judges to platoon commanders operating within a military hierarchy).

evaluated in a suitably cautious manner,[157] advocates of the intentionalist approach maintain that legislative history constitutes relevant, probative evidence of what Congress was seeking to accomplish. Principled reliance on such evidence to help resolve interpretive uncertainties reinforces the less autonomous aspects of judicial authority, by preferring as a default rule the policy choices expressed by key participants from the enacting legislature rather than the judicially crafted logic of language or the judicially projected sense of contemporary legal and social values. Once again, it is relevant in this regard that members of Congress generally seem to view legislative history as valuable to their own understanding of the text on which they vote.[158]

Judge Posner, whose scholarly writings place him firmly in the intentionalist camp,[159] has provided several perhaps unintentional examples of how this relatively dependent judicial role may be manifested in practice. In a series of majority opinions construing provisions of the Age Discrimination in Employment Act (ADEA), Judge Posner has expressed personal dismay over what he regards as special interest legislation celebrating the "middle-aged ... [as] an oppressed minority...."[160] He has voiced particular concern that "the quality of American higher education is endangered by the prospect of faculty gerontocracies" protected under the ADEA,[161] as well as expressing mock disbelief that Congress could have had the temerity to abolish mandatory retirement without regard to the inefficient social consequences of such a law.[162] In each of these cases, however, Posner, writing for a unanimous

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[157] For extended responses to claims that legislative history is inherently unreliable because the circumstances of its production render it corrupt or unrepresentative on a systemic basis, see Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 864–67, 872–74 (1992); Brudney, *supra* note 100, at 47–56.

[158] *See* Orrin Hatch, *Legislative History: Tool of Construction or Destruction*, 11 HARV. J.L. & PUB. POL'Y 43, 46–48 (1988) (concluding that notwithstanding occasional abuses in the process, legislative history can serve to reflect broad understandings about statutory text, offer insights when a provision is produced in the course of floor debate, and prevent slippage from agreements reached in Congress); *supra* note 112 and accompanying text (particularly the congressional sources). *See generally* Bank One Chi., N.A. v. Midwest Bank & Trust Co., 516 U.S. 264, 276–77 (1996) (Stevens, J., concurring) (maintaining that for text prepared in committee that enjoys bipartisan support, "since most members are content to endorse the views of the responsible committees, the intent of those involved in the drafting process is properly regarded as the intent of the entire Congress").

[159] *See generally* Posner, *supra* note 100, at 186–212; POSNER, *supra* note 109, at 262–72, 276–93.

[160] Shager v. Upjohn Co., 913 F.2d 398, 406 (7th Cir. 1990).

[161] Karlen v. City Colls. of Chi., 837 F.2d 314, 320 (7th Cir. 1988).

[162] *See* EEOC v. G-K-G, Inc., 39 F.3d 740, 746 (7th Cir. 1994) (observing, with respect to the plaintiff, that "[h]is bosses may simply have thought that 70 is when people should retire, but of course that is a forbidden ground [under the ADEA]. People do age, regardless of what some of the most optimistic backers of the law may have thought.").

Seventh Circuit panel, interpreted inconclusive ADEA language in favor of older employees.[163] In doing so, he emphasized the importance of enforcing the understanding reached by enacting Congresses, even while expressing his own distaste for the public values embodied in those understandings.[164]

Of course, devotion to legislative intent or purpose can give rise to shortcomings of its own. One problem has already been noted: comparative lack of transparency and accountability may at times permit, if not encourage, staff and lobbyists to produce legislative record materials of dubious reliability.[165] Beyond these episodic abuses in production, a historically restricted approach to the meaning of text may unduly favor the political or economic elites who were influential at the time of enactment. This possibility typically would come into play if the enacting Congress had disclosed no specific intent with respect to a controversy now before the courts. In such a setting, any judicial effort to reconstruct input that might have come from various affected individuals and groups seems likely to overvalue organized interests that were articulate and vocal at the time, while undervaluing how diffuse, less cohesive groups might have reacted had the current controversy been raised.[166]

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[163] *See id.* at 748–49 (affirming jury verdict of back pay and liquidated damages because jury could reasonably have found the employer willfully violated ADEA by firing older salesman); *Shager*, 913 F.2d at 406–07 (reversing district court grant of summary judgment against a discharged sales representative because a reasonable jury could have concluded that the company fired him due to his age rather than because he was an unsatisfactory worker); *Karlen*, 837 F.2d at 320 (reversing district court grant of summary judgment against three college professors because a reasonable jury could have found that the employer's early retirement program was an unlawful subterfuge to evade the purposes of the ADEA).

[164] *See, e.g.*, *Shager*, 913 F.2d at 406–07 (observing that "[my] sanguine view of the power of the marketplace [to deter age discrimination more efficiently than the law] was not shared by the framers and supporters of the Age Discrimination in Employment Act, and we shall not subvert the Act by upholding precipitate grants of summary judgment to defendants"); *Karlen*, 837 F.2d at 320 (noting that "the colleges and universities lobbied hard with Congress against the raising of the minimum mandatory retirement age [above 65], . . . and they are a powerful lobby. They lost, and they cannot be allowed by indirection to reinstitute what was for so long the age-65 mandatory retirement norm.").

[165] *See supra* notes 103–04 and accompanying text.

[166] One example involves the long-running dispute over the judicially created exemption of baseball from antitrust coverage. *See* Flood v. Kuhn, 407 U.S. 258 (1972); Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200 (1922). From an originalist standpoint, it seems likely that team owners and principal advertisers would have scoffed at any effort to apply the Sherman or Clayton Acts to "the business of baseball" in the early 20th century, while players and fans would scarcely have been knowledgeable about such antitrust matters. Thus, an effort to reconstruct what Congress would have done if the subject of a baseball exemption had been raised in the 1920s seems likely to yield a different result than an attempt to apply the statutory text in current circumstances, when players are far more effective as lobbyists and fans arguably are more impatient with threats of franchise relocation by owners. *See* Stephen F. Ross, *Reconsidering* Flood v. Kuhn, 12 U. MIAMI ENT. & SPORTS L. REV. 169, 187, 202–03 (1995).

An originalist focus also may make it harder for statutes to be effective over time when applied in new or unforeseeable settings. This difficulty can be observed in various efforts to apply the National Labor Relations Act—a New Deal-era statute drafted to promote and protect group action in an industrialized setting—to modern workplaces that are decidedly post-industrial. In recent decades, the Labor Board and the federal courts have struggled to apply the intent of the 1935 and 1947 Congresses when determining whether union organizers should have access to service sector workers in shopping malls,[167] or whether professional employees who exercise independent authority in their jobs should have access to a protected bargaining relationship at all.[168] Although courts might be aided in addressing these controversies by adopting a generous approach to extrapolating from congressional purposes, such generosity at some point undermines the notion that courts are actually relying on manifestations of legislative intent.[169]

This kind of tension implicates the broader question of whether to view an independent judiciary as a preferred agent of social and legal progress. To the extent we regard courts as "carriers and executors"[170] of such progress, we are likely to cede them greater authority to shape the evolving meaning of text, and to determine future policy directions for a given regulatory scheme. Conversely, insofar as we remain skeptical that judges have the expertise to anticipate politically preferred and socially worthwhile policy directions, or the will to advance these policies when they perceive them to exist, we will tend to adopt a more circumspect view toward judicial capabilities in the statutory arena. Such skepticism may well lead us to opt for a stronger intentionalist or purposive anchor, leaving courts more dependent on the best evidence of what enacting Congresses expected to accomplish or hoped they would accomplish.

As this brief review of different approaches suggests, federal judges interpreting statutes seek to fulfill their "dependent" role in distinctive ways. Whether performing primarily as experts on linguistic usage, architects of evolving values, or investigators into archival intent, courts inevitably assert their independent authority to impose

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167 *See* Lechmere, Inc. v. NLRB, 502 U.S. 527, 539–41 (1992) (reversing the Labor Board and providing extremely limited access for union organizers in a shopping mall setting). *See generally* Cynthia L. Estlund, *Labor, Property and Sovereignty After* Lechmere, 46 STAN. L. REV. 305 (1994).

168 *See* NLRB v. Health Care & Ret. Corp. of Am., 511 U.S. 571, 576–84 (1994) (excluding many nurses from NLRA coverage as "supervisors"); NLRB v. Yeshiva Univ., 444 U.S. 672, 679–91 (1980) (excluding university faculty from NLRA coverage as "managers"). *See generally* David M. Rabban, *Can American Labor Law Accommodate Collective Bargaining by Professional Employees?*, 99 YALE L.J. 689 (1990).

169 *See generally* Pub. Citizen v. United States Dept. of Justice, 491 U.S. 440, 472–73 (1989) (Kennedy, J., concurring) (criticizing majority's reliance on the "spirit" of the statute and the "intention of its makers" and adding "[t]he problem with spirits is that they tend to reflect less the views of the world whence they come than the views of those who seek their advice").

170 ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 19 (1970).

meaning on provisions of the United States Code. By focusing on the continuum between dependent and independent judicial action in the realm of statutory interpretation, we can promote greater candor as to the reasons why we may decide to value, or devalue, that performance.

CONCLUSION

What has been discussed in Parts I and II is not meant to call into question the basic commitment to judicial independence with which we began.[171] At the foundational level, independent courts are essential in order to fulfill both rule-of-law and separation-of-powers functions under our constitutional regime. Once we move beyond that foundation, however, we face more complex tradeoffs when considering the implications of judicial independence. Analyzing the possible influence of personal traits and pre-judicial activities, and assessing the potential impact of particular methods of judicial reasoning, can help us to recognize the ways in which "more judicial independence" is not always a good thing.

With respect to judicial background, both the executive and legislative branches promote important values of their own when they examine the personal and political background of prospective nominees in monitoring the judicial selection process.[172] We should be critical of occasional excesses in that monitoring effort, but at the same time encourage increased awareness of, and sophistication about, the role of judges' political and personal backgrounds in their decisionmaking processes. That sophistication should in turn enrich our understanding of how the rule of law evolves. We also need to develop greater appreciation for how methods of judicial reasoning in the interpretation of statutes may reflect varying degrees of independence being exercised by federal courts. That appreciation should enable us to locate courts more responsibly as power-sharing entities in relation to the Congress that prescribes the laws and the executive agencies that enforce them.

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[171] *See supra* notes 5–7 and accompanying text.

[172] *See generally* Newman, *supra* note 40, at 12.